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SYMPOSIUM

GREAT DISSENTS IN FOURTH AMENDMENT CASES

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National Center for Justice and Rule of Law

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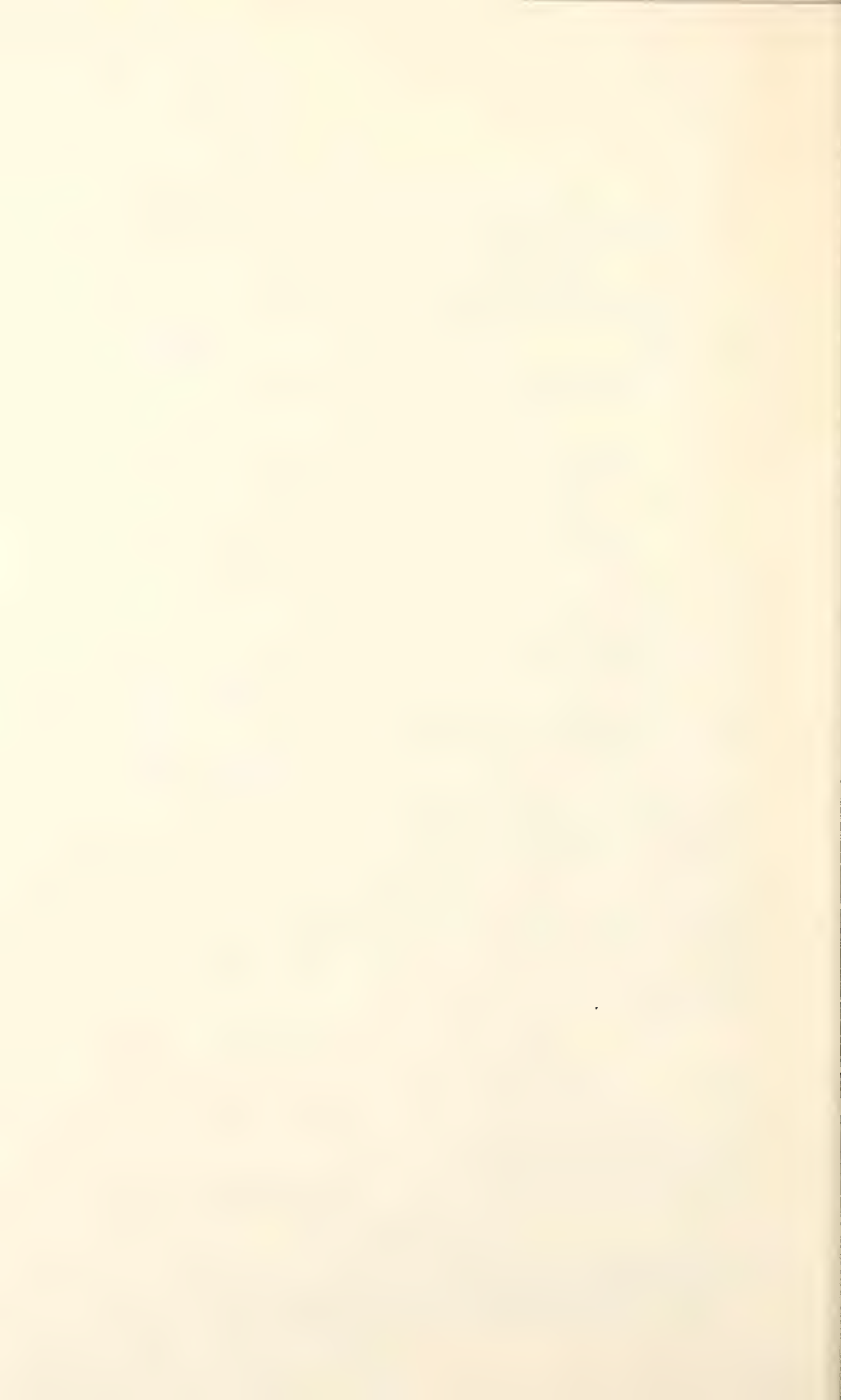
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FOREWORD

GREAT DISSENTS IN FOURTH AMENDMENT CASES

*Thomas K. Clancy**

The National Center for Justice and the Rule of Law,¹ which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the *Fourth Amendment Initiative* is its annual symposium on important search and seizure topics. On February 13, 2009, the Center hosted the symposium, "*Great Dissents in Fourth Amendment Cases*," which was the second day of an appellate judge conference on selected Fourth Amendment topics. In the audience were approximately thirty appellate judges from across the country, as well as academics,

* Director, National Center for Justice and the Rule of Law, and Research Professor, University of Mississippi School of Law.

¹ The National Center for Justice and the Rule of Law is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the United States Department of Justice. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles stemming from this symposium are those of the author and do not represent the official position of the United States Department of Justice. For more information about the Center, please visit www.ncjrl.org.

members of the law school community, and others. It was web-cast, and this symposium edition of the law journal is widely distributed.

Five dissents were examined at the symposium and in the articles written for this edition of the *Mississippi Law Journal*. The authors have chosen the seminal dissents of Justice Brandeis in *Olmstead v. United States*,² Justice Douglas in *Terry v. Ohio*,³ Justice Harlan in *United States v. White*,⁴ Justice Marshall in *Schneckloth v. Bustamonte*,⁵ and Justice O'Connor in *Atwater v. Lago Vista*.⁶ The distinguished authors are Professor Paul Butler of the George Washington University Law School, Professor Catherine Hancock⁷ of Tulane University School of Law, Professor Arnold H. Loewy of Texas Tech University School of Law, Professor Wayne A. Logan of Florida State University College of Law, and Professor Carol S. Steiker of Harvard Law School.

What makes a dissent "great"? Depending on one's point of view, there are many candidates⁸ for such designation, ranging

² 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

³ 392 U.S. 1, 35-39 (1968) (Douglas, J., dissenting).

⁴ 401 U.S. 745, 769-95 (1971) (Harlan, J., dissenting).

⁵ 412 U.S. 218, 277-90 (1973) (Marshall, J., dissenting).

⁶ 532 U.S. 318, 360-73 (2001) (O'Connor, J., dissenting).

⁷ See also Catherine Hancock, *Justice Powell's Garden: The Ciraolo Dissent and Fourth Amendment Protection for Curtilage-Home Privacy*, 44 SAN DIEGO L. REV. 551 (2007) (addressing another important dissent in a Fourth Amendment case).

⁸ E.g., *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Breyer, J., dissenting) (exclusion's role); *Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 191 (2004) (Breyer, J., dissenting) (impact of requiring person to identify himself); *Minnesota v. Carter*, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting) (standing of house guests); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (O'Connor, J., dissenting) (role of individualized suspicion); *County of Riverside v. McLaughlin*, 500 U.S. 44, 59 (1991) (Scalia, J., dissenting) (length of time to detain prior to probable cause hearing); *Illinois v. Rodriguez*, 497 U.S. 177, 189 (1990) (Marshall, J., dissenting) (apparent authority to consent); *California v. Greenwood*, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting) (normative approach to privacy); *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) (Blackmun, J., dissenting) (workplace privacy expectations); *Illinois v. Krull*, 480 U.S. 340, 361 (1987) (O'Connor, J., dissenting) (application of exclusionary rule to acts of legislature); *Ybarra v. Illinois*, 444 U.S. 85, 98 (1979) (Rehnquist, J., dissenting) (relationship of two clauses in context of detention of bar patron); *Smith v. Maryland*, 442 U.S. 735, 747 (1979) (Stewart, J., dissenting) (pen registers); *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978) (Stewart, J., dissenting) (relation of the First and Fourth Amendments); *Rakas v. Illinois*, 439 U.S. 128, 156 (1978) (White, J., dissenting) (automobiles and privacy); *United States v. Robinson*, 414 U.S. 218, 238 (1973) (Marshall, J., dissenting) (rejecting per se search inci-

from Justice Brandeis's dissent in *Olmstead*, which first proposed privacy as a centralizing principle and offered a broad view of the applicability of the Amendment, Justice Frankfurter's defense of the warrant preference model of reasonableness,⁹ Justice Brennan's normative approach to privacy in such cases as *Greenwood*,¹⁰ to Justice Black's conservative views of the structure of the Fourth Amendment in *Katz*¹¹ and *Berger*.¹² But is there more to a dissent that makes it important beyond espousing a particular point of view? Is it the clarity of the vision?¹³ Is it the principled nature of the opinion? Is it merely the author's facility with language or the sentiment expressed?¹⁴ Is it the fact that, in a subsequent case, that view prevailed?

dent to arrest rule); *Couch v. United States*, 409 U.S. 322, 344 (1973) (Marshall, J., dissenting) (relation of the Fourth and Fifth Amendments); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting) (role of suppression); *Alderman v. United States*, 394 U.S. 165, 200 (1969) (Fortas, J., concurring in part and dissenting in part) (standing); *Lopez v. United States*, 373 U.S. 427, 446 (1963) (Brennan, J., dissenting) (secret recording by undercover agent); *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting) (liberal versus literal approach to interpretation).

⁹ See cases cited *infra* note 15.

¹⁰ *California v. Greenwood*, 486 U.S. 35 (1988).

¹¹ *Katz v. United States*, 389 U.S. 347 (1967).

¹² *Berger v. New York*, 388 U.S. 41 (1967).

¹³ An articulation of the dangers of the effects of technological advances and calls for a liberal construction were repeatedly made throughout the twentieth century, beginning with Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting). After *Olmstead*, many other dissenting justices expressed similar concerns. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 218, 226 (1986) (Powell, J. dissenting) (noting that advances in technology allow police to conduct surveillance without physical trespass); *Dow Chem. Co. v. United States*, 476 U.S. 227, 251 (1986) (Powell, J., concurring in part and dissenting in part) (suggesting that dissemination of technological advances threatens privacy rights); *Osborn v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting) ("[T]he privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps."); *On Lee v. United States*, 343 U.S. 747, 759 (1952) (Frankfurter, J., dissenting) (noting that police intrusion of privacy will increase as technology progresses); *Goldman v. United States*, 316 U.S. 129, 137-39 (1942) (Murphy, J., dissenting) (noting that science has created additional threats to privacy).

¹⁴ E.g., *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting):

[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Turning to a related question, is there a candidate for the label "great dissenter" in Fourth Amendment cases? That is, some one member of the Court who, over time, espoused a vision of the Amendment that was in opposition to the majority that stands out as particularly noteworthy. A few candidates come to mind; justices who dissented in a series of cases that together created a theme or coherent alternative vision for Fourth Amendment analysis. One was Justice Frankfurter, who vigorously argued for the central role of a warrant and the need for objective criteria to measure reasonableness.¹⁵ Another is Jus-

See also *On Lee v. United States*, 343 U.S. 747, 759-60 (1952) (Frankfurter, J., dissenting) (commenting on wiretapping, he observed that "[f]ew sociological generalizations are more valid than that lawlessness begets lawlessness"). Justice Brandeis's dissent, which is discussed by Professor Steiker, is perhaps the most literary of all Fourth Amendment opinions. Thus, for example, Brandeis urged that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting). Rejecting a literal construction to the Amendment, he argued:

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478. In a similar vein is *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting). In contrast, Justice Black's dissent in *Katz v. United States*, 389 U.S. 347, 373 (1967), stands out for his defense of a literal approach to construing the Amendment:

In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

¹⁵ *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting); *Harris v. United States*, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting). Frankfurter is sometimes overlooked because of his refusal to apply the Fourth Amendment directly to the activities of state and local government; instead, he sought an accommo-

tice Douglas, whose dissent in *Terry* is discussed by Professor Butler; he produced a series of dissents opposing the Warren Court's remodeling of traditional Fourth Amendment analysis¹⁶ and outlining his concerns about the encroachments of modern life.¹⁷ A third is Justice Brennan, who was an architect of the Warren Court's remodeling of the Amendment's structure.¹⁸ When that era ended, he became a prolific member of the minority on the Court, criticizing the Burger and Rehnquist Courts' Fourth Amendment jurisprudence.¹⁹ Finally, in contrast to Douglas and Brennan's liberal views, which sought expansive coverage of the Amendment, Justice Black wrote some remarkable dissents, seeking to interpret the Amendment literally and restrict its application to historical police practices.²⁰

There are, of course, other important dissents and dissenters. Turning to a current member of the Court, Justice Stevens has served on the Court since December 19, 1975, and that term has encompassed the tenure of three different Chief Justices. His tenure is remarkable for the sheer number of his dissents and concurring opinions. Stevens has expressed his views in

dation by utilizing a due process rationale. See, e.g., *Frank v. Maryland*, 359 U.S. 360 (1959); *Irvine v. California*, 347 U.S. 128, 142-49 (1954) (Frankfurter, J., dissenting); *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁶ E.g., *United States v. Matlock*, 415 U.S. 164, 178 (1974) (Douglas, J., dissenting).

¹⁷ E.g., *Osborn v. United States*, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting).

¹⁸ E.g., *Warden v. Hayden*, 387 U.S. 294 (1967); *Wong Sun v. United States*, 371 U.S. 471 (1963).

¹⁹ E.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 456 (1990) (Brennan, J., dissenting) (sobriety checkpoints); *Horton v. California*, 496 U.S. 128, 142 (1990) (Brennan, J., dissenting) (plain view); *Maryland v. Buie*, 494 U.S. 325, 339 (1990) (Brennan, J., dissenting) (protective sweeps); *Florida v. Riley*, 488 U.S. 445, 456 (1989) (Brennan, J., dissenting) (helicopter surveillance of curtilage); *California v. Greenwood*, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting) (expectations of privacy in garbage left for collection); *United States v. Dunn*, 480 U.S. 294, 305 (1987) (Brennan, J., dissenting) (open fields doctrine); *Nix v. Williams*, 467 U.S. 431, 458 (1984) (Brennan, J., dissenting) (inevitable discovery doctrine); *United States v. Leon*, 468 U.S. 897, 928 (1984) (Brennan, J., dissenting) (good faith exception to exclusion); *Illinois v. Gates*, 462 U.S. 213, 275 (1983) (Brennan, J., dissenting) (methodology to assess usefulness of informant tips); *New York v. Belton*, 453 U.S. 454, 463 (1981) (Brennan, J., dissenting) (bright line rule for vehicle searches incident to arrest); *Andresen v. Maryland*, 427 U.S. 463, 484 (1976) (Brennan, J., dissenting) (particularity requirement); *Stone v. Powell*, 428 U.S. 465, 502 (1976) (Brennan, J., dissenting) (application of exclusionary rule to habeas corpus proceedings).

²⁰ *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting); *Berger v. New York*, 388 U.S. 41, 70 (1967) (Black, J., dissenting).

virtually every major Fourth Amendment opinion since joining the Court, regardless of whether the government or the individual prevailed. Perhaps Justice Stevens's most influential dissent was in *California v. Hodari D.*²¹ In that case, Justice Scalia, writing for the majority, redefined the concept of a seizure, marking the point at when a person submits to a show of authority by the police or when the police apply physical force.²² This contrasted to the commonly held view prior to *Hodari D.* that applicability of the Fourth Amendment was not dependent upon an individual's actions and that it did not matter if the person stopped as a result of the intimidating police action.²³ Justice Stevens, dissenting in *Hodari D.*, mounted a significant defense of that view, arguing, inter alia, that "the character of the citizen's response should not govern the constitutionality of the officer's conduct."²⁴ A dozen state courts, on independent state grounds, have rejected the *Hodari D.* majority's approach based, in large part, on Stevens's dissent.²⁵ Does the mere number of his dissents put Stevens in a category of a great dissenter or does the persuasiveness of his views in *Hodari D.*, as measured by the number of courts adopting that dissent, so qualify that dissent?

Neither this symposium nor this introduction identifies all the candidates for characterization as "great" dissents. Too many points of view preclude such a task. Nonetheless, the ar-

²¹ 499 U.S. 621 (1991).

²² *Id.* at 622-29.

²³ See generally THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 5.1.4.2 (2008).

²⁴ 499 U.S. at 645 (Stevens, J., dissenting).

²⁵ See *Joseph v. State*, 145 P.3d 595, 605 (Alaska Ct. App. 2006); *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992); *Jones v. State*, 745 A.2d 856, 868 (Del. 1999); *State v. Quino*, 840 P.2d 358, 362 (Haw. 1992); *Commonwealth v. Stoute*, 665 N.E.2d 93, 95-98 (Mass. 1996); *Welfare of E.D.J.*, 502 N.W.2d 779, 781-83 (Minn. 1993); *State v. Clayton*, 45 P.3d 30, 34 (Mont. 2002); *State v. Tucker*, 642 A.2d 401, 405 (N.J. 1994); *State v. Beauchesne*, 868 A.2d 972, 979 (N.H. 2005); *People v. Bora*, 634 N.E.2d 168, 169-70 (N.Y. 1994); *State v. Puffenbarger*, 998 P.2d 788, 792 (Or. Ct. App. 2000); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996); *State v. Randolph*, 74 S.W.3d 330, 336 (Tenn. 2002); *State v. Young*, 957 P.2d 681, 686 (Wash. 1998). The Supreme Court of Louisiana has also rejected *Hodari D.* as the sole standard to determine when a seizure occurs and has added, for the purpose of the Louisiana Constitution, the additional protection against "imminent actual stops." *State v. Tucker*, 626 So. 2d 707, 712 (La. 1993).

ticles by the distinguished scholars that comprise this symposium add to our knowledge of the Fourth Amendment and contribute to the debate as to its meaning. I thank the authors for contributing to the symposium and furthering our knowledge of Fourth Amendment jurisprudence.



“A LONG STEP DOWN THE TOTALITARIAN PATH”: JUSTICE DOUGLAS’S GREAT DISSENT IN *TERRY V. OHIO*

*Paul Butler**

INTRODUCTION

The police are on a routine patrol in Washington, D.C., in an all-black housing project. Imagine that at midnight they see a car carrying three white teenagers ride slowly around the block three times. The teens see a group of young black men hanging out on a street corner. They park their car near the young men and look over at them. The men ignore the kids. After five minutes, the kids start driving slowly around the block again. What should the police do?

The police are on foot patrol at a busy mall in suburban Memphis. It is lunch time on a crowded Saturday. Three Middle-Eastern-looking men have entered the food court separately, and they sit at three different tables. The men are wearing traditional Islamic clothing. The mall does not get a lot of men dressed like that. One of the men has a suitcase with him that has a decal with Arabic writing. The other two have knapsacks. Each sits at a different table, takes out a copy of the Koran, and starts reading it. What should the police do?

These hypotheticals present the essential issue in *Terry v. Ohio*.¹ Justice Douglas answers, in dissent, that the police should not do anything official. They should not bring the formal power of the state to bear—at least not yet. They can do anything that private citizens could do, like walk up to the white teenagers or the Muslim men and start chatting, but if the teens or the men want to take off, the cops have to let them go. In Douglas’s view of the Constitution, the police must have

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¹ 392 U.S. 1 (1968).

probable cause before they detain any person. My thesis is that Justice Douglas's radical and "lonely"² dissent was right.

Perhaps, however, the Douglas dissent is not where the radical part started. Whenever the point is made that a Supreme Court decision is extreme, one has to ask whether it is the interpretation that is extreme or the Constitution itself. It is clear, for example, that the Fifth Amendment privilege against self-incrimination—a prohibition against the government requiring you to answer questions that could send you to prison—is one of those extreme rights. While no reasonable person would argue that the police should be able to torture to obtain information, many civilized societies would allow the government to put a murder suspect on the stand and have the prosecution ask, "Did you do it?" In the radical construct of freedom embodied in the Fifth Amendment, however, the state cannot force you to be an agent of your own destruction.

The text of the Fourth Amendment is less suggestive: one clause requires that government searches and seizures be reasonable, and the other requires that warrants be based on probable cause. The Warrant and Reasonableness Clauses operate in tandem.³ There is debate among legal scholars about which one predominates.⁴ The Supreme Court's reading has been that

² Akhil Reed Amar, *Terry and the Future: Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1115 (1998).

³ Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 394-95 (1994) ("[t]o determine the standards for a constitutional search, the Justices have engaged in a long-standing debate over the relationship of the amendment's two conjunctive clauses: the Reasonableness Clause and the Warrant Clause.").

⁴ Compare Shenequa L. Grey, *Revisiting the Application of the Exclusionary Rule to the Good Faith Exceptions in Light of Hudson v. Michigan*, 42 U.S.F. L. REV. 621, 628 (2008) ("whether it is by a warrant or an exception to the warrant requirement, the search or seizure is constitutional if the conduct is reasonable.") and Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL OF RTS. J. 241, n.24 (1998) ("The Court . . . often has stated that there exists a presumption that a search or seizure is unreasonable unless the actor obtains a warrant.") with Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 401 (1988) ("[i]n Terry, however, the Court spurned the warrant clause and traditional yardstick of probable cause, turning instead to the reasonableness clause and the balancing test appropriated from Camara.") and Scott E. Sundby, *"Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1754 (1994) ("[w]hat is not needed at this juncture is another effort to explain

“the Warrant Clause’s requirement of probable cause [was] the substantive justification for a constitutional search.”⁵ From this perspective, “the Warrant Clause . . . domina[ted] . . . [because] although the Reasonableness Clause could excuse the absence of a warrant in certain situations, the Reasonableness Clause could not authorize a search in the absence of probable cause.”⁶ Another commentator notes that the “traditional” dominance of the Warrant Clause over the Reasonableness Clause stemmed from “the Court[’s] . . . emphasi[s] [on] the Warrant Clause as the [Fourth] Amendment’s ‘cardinal principle . . . subject only to a few specifically established and well-delineated exceptions’ and had used the Reasonableness Clause as a means of justifying those exceptions based on overriding necessities such as exigent circumstances.”⁷ The Warrant Clause predominates when the Court casts the Reasonableness Clause in a supporting role to probable cause.

That is where the radical part comes in. Under this reading of the Fourth Amendment, which was standard when *Terry* was decided, searches and seizures without probable cause are presumptively unconstitutional. The Douglas dissent was more consistent with this “law” than the majority opinion—even when it compelled the police to leave a suspect alone when it might be “reasonable” for them to detain him.

Terry v. Ohio governs more non-consensual police interactions with citizens than any other decision of the Supreme Court. Many more people are detained than are arrested. Law enforcement exploitation of the *Terry* doctrine, as seen in “zero tolerance” and “broken windows” police strategies, have occa-

why the Court is being untrue to the Fourth Amendment of a past time when the Warrant Clause *was* king.”) (emphasis added). The Supreme Court’s jurisprudence provides examples which indicate that the warrant clause predominates over the reasonableness clause. See Parr, *infra* note 4 (citing “Payton v. New York, 445 U.S. 573 (1980) (holding that a warrant is required to enter a home for the purpose of making an arrest) [and] *Mincey v. Arizona*, 437 U.S. 385 (1978) (holding that there is no ‘murder scene exception’ to the warrant requirement.”)).

⁵ Bacigal, *supra* note 3, at 394.

⁶ *Id.* at 395.

⁷ Sundby, *supra* note 4, at 1756-57 (noting that “almost all Fourth Amendment analysis was channeled through the Warrant Clause’s requirements of a warrant based upon probable cause of misconduct.”) (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982) (citation omitted)).

on the "life cycle" of corporations, and teaming up with Harvard Business School professor George Bates to launch a joint degree program between the schools.²¹ Douglas reinvented the study of corporate law, wrote five major corporate law casebooks in five years and conducted empirical social-science research into the effect of bankruptcy law. Meanwhile, the Great Depression and local financial scandals brought issues of corporate law issues into a harsh limelight.²² Douglas's research received national attention, and he was promoted to Sterling Professor of Law at Yale.²³

William Douglas's ambition, however, extended outside of the academy. He became an expert on the Securities Act of 1933, which requires registration of securities sales to inform investors of the nature and potential risks of investments, and he published an article entitled "Protective Committees in Railroad Reorganization."²⁴ Due to this experience, Douglas was appointed to direct a study, headed by the Securities and Exchange Commission and mandated under the Securities Act of 1934 Act, which would investigate corruption in bankruptcy proceedings.²⁵ Hiring his former Yale student Abe Fortas to be his right-hand man, Douglas took an aggressive stance; he summed up his philosophy towards corrupt corporations in three words: "Piss 'on 'Em."²⁶

Corruption was everywhere. Douglas uncovered so many illegal practices that *Barron's*, the *National Financial Weekly* described his effort as "obviously a complete victory for the commission."²⁷ His work caught the attention of Robert Kintner, the *New York Herald Tribune's* financial columnist, who found Douglas's analysis so cogent that Douglas was soon featured in at least one article each week on the first page of the financial section.²⁸ After Douglas led several other successful investiga-

²¹ *Id.* at 87-88.

²² *Id.* at 89-91.

²³ *Id.* at 104.

²⁴ *Id.* at 106-07.

²⁵ *Id.* at 107.

²⁶ *Id.* at 108-09.

²⁷ *Id.* at 110.

²⁸ *Id.*

tions, President Franklin Delano Roosevelt called Douglas to appoint him SEC Commissioner.²⁹ In this position, Douglas delivered “two fisted addresses” that railed against the excesses and corruption in the financial community.³⁰ When Charles R. Gay, president of the New York Stock Exchange, accused the SEC of over regulating the market, FDR responded by appointing Douglas, the SEC Commissioner whom Wall Street feared most, to be SEC Chairman.³¹

Soon after, President Roosevelt selected Douglas to replace retiring Justice Louis Brandeis on the United States Supreme Court.³² He was confirmed by a vote of sixty-two to four.³³

On the Court, Justice Douglas was unique; he wrote short opinions in “one burst of creative energy” and developed the reputation of being “the quickest opinion writer since Holmes.”³⁴ Recent scholarship suggests that his early votes and decisions, which reflected a pro-government conservatism,³⁵ may have been influenced by his continuing political aspirations; thanks to the help of various political operatives, Douglas was almost chosen to displace Henry Wallace as President Roosevelt's vice president in 1944,³⁶ to replace Presidential Harry Truman as the Democrat's presidential nominee in 1948,³⁷ and to run alongside potential Presidential candidate Lyndon B. Johnson in 1960.³⁸ In time, perhaps due to a changing political landscape or internal disputes with conservative Justices Felix Frankfurter and Robert H. Jackson, Douglas began to shift away from deference to government authority and towards expansion of civil rights.³⁹ When liberal Justices Frank Murphy and Wiley Rutledge died within two months of each other, Justice Douglas and Justice Hugo Black, eventually joined by Chief Justice Earl Warren and

²⁹ *Id.* at 110-17.

³⁰ *Id.* at 124-30.

³¹ *Id.* at 131-33.

³² *Id.* at 174.

³³ *Id.* at 175.

³⁴ *Id.* at 182.

³⁵ *Id.* at 246-47.

³⁶ *Id.* at 212-32.

³⁷ *Id.* at 251-65.

³⁸ *Id.* at 346-51.

³⁹ *Id.* at 267-68.

Associate Justice William Brennan, carried the liberal mantle, leading the Court towards the largest expansion of individual rights ever seen in United States jurisprudence.⁴⁰ Justice Douglas resigned in 1975, after having served on the Supreme Court for thirty-six years, longer than any other Supreme Court Justice in history.⁴¹ Douglas wrote 1,164 full opinions, including 486 dissents.⁴²

II. THE GREAT DISSENTER

Justice Douglas was an influential Supreme Court dissenter.⁴³ He has been characterized as a "maverick"⁴⁴ and as one of

⁴⁰ *Id.* at 302-03.

⁴¹ *Id.* at 495.

⁴² *Id.* at 495.

⁴³ At least thirty-eight articles refer to one of Justice Douglas's dissents using terms such as strong, powerful, forceful, notable or otherwise note the significance of the dissent. Using rough categories, Justice Douglas's dissents spanned Fourth Amendment jurisprudence, equal protection jurisprudence, privacy jurisprudence, takings jurisprudence, environmental jurisprudence and taxation. One example from each of these five categories is included below.

Yale Kamisar, *Symposium: Miranda after Dickerson: The Future of Confession Law: Foreword: From Miranda to Section 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 887 (2001) (noting that "[d]espite Justice Douglas's forceful dissent, the mischievous language in [*Michigan v.*] *Tucker*[, 417 U.S. 433, 446 (1974)] did not go away").

Mark John Kappelhoff, Note, *Bowers v. Hardwick: Is there a Right to Privacy?*, 37 AM. U. L. REV. 487, 493-94 (1988) (asserting that "[i]n 1961, Justice Douglas's dissent in *Poe v. Ullman*, 367 U.S. 497, 515-16 (1961) (Douglas, J., dissenting) provided the jurisprudential foundation for expanding the meaning of 'liberty'").

Scott Alexander Nelson, *The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug Forfeiture*, 26 ST. MARY'S L.J. 157, 166 (1994) (referring to Justice Douglas's dissent in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 693 (1974) as notable because it "recognized that the notion of guilty property is a fiction and depicted the case as 'one of extreme hardship.'"). Daryl Fisher-Ogden & Shelley Ross Saxer, *World Religions and Clean Water Laws*, 17 DUKE ENVTL. L. & POL'Y F. 63, 77-79 (2006) (discussing how Justice Douglas, in his famous *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) dissent, argued that environmental objects should be granted standing "to sue for their own preservation.")

James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 319 n.277 (1995) (referring to Justice Douglas's dissent in *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) as notable).

⁴⁴ Jim Chen, *Defunis, Defunct*, 16 CONST. COMMENT. 91, 96-7 (1999) ("Like President Clinton after him, [in *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting)] Justice Douglas ultimately decided to try mending affirmative action without ending it.") (quoting Bernard Schwartz, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 33, 33 (New York U. Press, 1988)).

the “Warren Court’s leading liberals. . . .”⁴⁵ In *DeFunis v. Odegaard*,⁴⁶ Justice Douglas was the only member of the Court to “address[] the merits of DeFunis’[s] constitutional claim.”⁴⁷ Douglas demonstrated his nuanced understanding of racial justice in his statement that “[t]he melting pot is not designed to homogenize people, making them uniform in consistency.”⁴⁸ He asserted that courts should consider whether to replace the LSAT with another test to ensure “that racial factors do not militate against an applicant or on his behalf.”⁴⁹ Justice Douglas’s *DeFunis* dissent “foreshadowed the ‘plus factor’ approach that would prevail in *Bakke*[,] . . . [and] [h]is proposals to abolish the LSAT and to administer direct tests of an applicant’s propensity to work in underserved communities resonate[s] with many contemporary proposals for reform.”⁵⁰ Similarly, Justice Douglas’s dissent in *Wright v. Rockefeller*⁵¹ “anticipated and . . . rejected the ‘benign intent’ argument invoked in later affirmative action cases.”⁵² “[T]hree decades later [Justice Douglas’s reasoning] in *Wright* [influenced a chain of] . . . voting-rights decisions beginning with *Shaw v. Reno*.”⁵³

Another example of Justice Douglas’s ability to see into the future is found in his dissent in *Sierra Club v. Morton*.⁵⁴ In 1972, it seemed radical for Justice Douglas to argue that trees should be given standing in court.⁵⁵ Today, lawsuits challenging harms committed against the environment are filed regularly.⁵⁶

⁴⁵ *Id.* at 98.

⁴⁶ 416 U.S. 312 (1974) (Douglas, J., dissenting).

⁴⁷ Foy Meyer III, *The Rise and Fall of Affirmative Action*, 8 TEX. REV. L. & POL. 437, 511 (2004) (“Perhaps the most important aspect of *DeFunis* was Justice Douglas’[s] dissenting opinion, the only one addressing the merits of DeFunis’[s] constitutional claim.”).

⁴⁸ 416 U.S. at 334 (Douglas, J., dissenting).

⁴⁹ *Id.* at 336; see Chen, *supra* note 44, at 96-97.

⁵⁰ Chen, *supra* note 44, at 97.

⁵¹ 376 U.S. 52 (1964).

⁵² Chen, *supra* note 44, at 98.

⁵³ *Id.* (referring to *Shaw v. Reno*, 509 U.S. 630 (1993)).

⁵⁴ 405 U.S. 727 (1972) (Douglas, J., dissenting).

⁵⁵ *Id.*

⁵⁶ Kimberly E. O’Leary, *Using “Difference and Analysis” to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 68-9 (1997) (“When the late Supreme Court Justice William O. Douglas posed his now-famous question ‘Should trees have standing?’ [in *Sierra Club v. Morton*] he was widely believed to be far outside the mainstream of American law.

The landmark Supreme Court case *Griswold v. Connecticut*⁵⁷ is a cornerstone of privacy jurisprudence. The source of *Griswold*'s reasoning? Justice Douglas's *Poe v. Ullman*⁵⁸ dissent.⁵⁹ Justice Douglas's *Poe* dissent "[laid] the jurisprudential foundation for expanding the meaning of 'liberty.'"⁶⁰ In *Adler v. Board of Education*,⁶¹ Justice Douglas was the first Supreme Court Justice to "conceive a theory of academic freedom" and, more importantly, the first to "identif[y] [it] as a subset of the First Amendment."⁶² Again, Justice Douglas's theory was later adopted by the Supreme Court.⁶³ Justice Douglas's dissent in *Packard Motor Co. v. National Labor Relations Board*⁶⁴ became the "intellectual underpinning for the Court's adherence to the management-labor dichotomy."⁶⁵ State legislatures were influenced by Justice Douglas's dissent in *Broadrick v. Oklahoma*⁶⁶ to "affirm[] the rights of employees to participate in politics while not on the job."⁶⁷ One scholar asserts that Justice Douglas's dissent in

However, citizens now routinely bring lawsuits that challenge harms to the environment.").

⁵⁷ 381 U.S. 479 (1965).

⁵⁸ 367 U.S. 497 (1961).

⁵⁹ Maggie Ilene Kaminer, *How Broad is the Fundamental Right to Privacy and Personal Autonomy? – On What Grounds Should the Ban on the Sale of Sexually Stimulating Devices be Considered Unconstitutional?*, 9 AM. U.J. GENDER SOC. POL'Y & L. 395, 402 (2001) ("Five years after the Court refused to address a Connecticut statute criminalizing the use of contraceptives by married couples, the Court adopted the reasoning of Justice Douglas'[s] dissent in *Poe v. Ullman* in *Griswold v. Connecticut* [, 381 U.S. 479, 485-86 (1965)] and held the same Connecticut statute unconstitutional.").

⁶⁰ Kappelhoff, *supra* note 43, at 493-94 ("In 1961, Justice Douglas' dissent in *Poe v. Ullman* provided the jurisprudential foundation for expanding the meaning of 'liberty.'").

⁶¹ 342 U.S. 485 (1952) (Douglas, J., dissenting).

⁶² Rachel E. Fugate, *Choppy Waters are Forecast for Academic Free Speech*, 26 FLA. ST. U.L. REV. 187, 192 (1998) ("What is most notable about Justice Douglas'[s] dissent [in *Adler*] is not that academic freedom is mentioned for the first time but, rather, that it is identified as a subset of the First Amendment.").

⁶³ *Id.* at 192.

⁶⁴ 330 U.S. 485 (1947) (Douglas, J., dissenting).

⁶⁵ Jonathon B. Goldin, Comment, *Labor-Management Cooperation: Bath Iron Works's Bold New Approach*, 47 ME. L. REV. 415, 453-54 n.158 (1995) ("It was Justice Douglas's dissent in the Court's 1947 decision in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, n.158 (1947), that became the intellectual underpinning for the Court's adherence to the management-labor dichotomy.").

⁶⁶ 413 U.S. 601 (1973) (Douglas, J., dissenting).

⁶⁷ *Developments in the Law – Public Employment* [Part 1 of 2], 97 HARV. L. REV. 1611, 1659 (1984) ("More significantly, in light of the relaxation of federal restrictions on

*Cardona v. Power*⁶⁸ is one of "[t]he two most important Supreme Court opinions relating to the question of non-English speaking voters."⁶⁹ As demonstrated by the examples presented above, Justice Douglas's positions were not those of an irresponsible maverick. Rather, his dissenting opinions provided foundations for future legal developments.

Justice Douglas also had a capacity for empathetic decision-making. For example, one scholar notes that Justice Douglas's "central concern" in *Wisconsin v. Yoder*⁷⁰ "was not the dispute between the parents and the state . . . but [rather] the possibility of a dispute between the children and the state."⁷¹ In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁷² Justice Douglas noted that the case was "one of extreme hardship."⁷³ As reflected in *Sierra Club v. Morton*,⁷⁴ Justice Douglas's empathy extended even to nature.⁷⁵

III. 1967: STREET LAW

In 1967, the year *Terry* was decided, the streets seemed buck wild. Not only was crime increasing, there were also urban riots and campus uprisings. The police responded aggressively, by detaining people, not because they had probable cause to arrest, but rather because their suspicion was aroused, and they wanted to investigate further. In the hypothetical at the

nonfederal employees, many state legislatures have taken a cue from Justice Douglas's dissent in *Broadrick* and affirmed the rights of public employees to participate in politics while not on the job.").

⁶⁸ 384 U.S. 672 (1966) (Douglas, J., dissenting).

⁶⁹ Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1421 (1988) ("The two most important Supreme Court opinions relating to the question of non-English speaking voters are the majority opinion in *Katzenbach v. Morgan* [384 U.S. 641 (1966)] and Justice Douglas' [s] dissent in *Cardona v. Power* ").

⁷⁰ 406 U.S. 205 (1972) (Douglas, J., dissenting).

⁷¹ Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 387 (1997) ("Even today, almost three decades after the Court decided *Yoder*, Justice Douglas's understanding of children and of the parent-child relationship in that case contrasts markedly with almost all Supreme Court jurisprudence involving conflicts between parents and the state.")

⁷² 416 U.S. 663, 693 (1974) (Douglas, J., dissenting).

⁷³ Nelson, *supra* note 43, at 166.

⁷⁴ 405 U.S. 727 (1971) (Douglas, J., dissenting).

⁷⁵ *Id.* at 742.

beginning of this article, for example, the police might have put on their siren and flashing light, stopped the car containing the teens, and asked what they were doing in that part of town at that time of night. When the police stopped someone they thought might have a weapon, they frisked.

If one were to ask the cops about their legal authority for the stop and frisk, they would most likely offer one of two answers: 1) It was what they were taught on the street or in the police academy or 2) that the Fourth Amendment applied only to arrests and full searches, and not to investigative detentions and pat downs. A New York police officer might say that he had "reasonable suspicion." State courts in New York were one of the few court systems that prior to 1967 had considered the constitutionality of stop and frisks, and that is the standard that they developed.⁷⁶

IV. STOP AND FRISK

In *Terry v. Ohio*, the Supreme Court blessed the police practice of investigative detentions without probable cause. It ruled that the police can briefly detain someone when they have "reasonable suspicion" that a crime may be occurring, or is about to occur.⁷⁷ Cops can "pat down" the person whom they have stopped if they have reasonable suspicion that the suspect is armed.⁷⁸ The "sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope" to discover weapons.⁷⁹

In the *Terry* case, an experienced detective's attention was drawn to two African-American men who were standing on a street corner in downtown Cleveland.⁸⁰ The detective did not know why he had started watching them; he said he was "attracted" because "they didn't look right to me at the time."⁸¹ The detective observed the men walk up and down the street looking

⁷⁶ *Terry*, 392 U.S. at 19 n.15.

⁷⁷ 392 U.S. at 27.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 29.

⁸⁰ *Id.* at 5.

⁸¹ *Id.*

in the same store window several times.⁸² He suspected they were “casing” a store with the intention of robbing it.⁸³ Next, however, the two men walked away from the store and were joined by a white man.⁸⁴ At that point, the detective approached, asked the men to give their names, and when Mr. Terry “mumbled something” in response, he grabbed Mr. Terry and pushed him against a wall.⁸⁵ The detective then patted down Mr. Terry and felt something that might have been a gun in his coat pocket.⁸⁶ He ordered all three men inside a store, where he frisked them. Mr. Terry and one of the other men were carrying guns.⁸⁷

The prosecutors argued that the Fourth Amendment, which regulates government searches and seizures, did not apply because Mr. Terry had not been searched and seized within the meaning of the Amendment. The Supreme Court

emphatically reject[ed] this notion. . . . It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a “search.” Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a “petty indignity.” It is a serious intrusion upon the sanctity of the person, which may in-

⁸² *Id.* at 6.

⁸³ *Id.*

⁸⁴ Upon first blush, it’s strange that the detective approached Mr. Terry while he was walking away from the store that the detective suspected he was casing but the fact that the two African-American men were joined by a white man probably would have further aroused the officer’s suspicion. During this time in Cleveland (although not just Cleveland), police lore was that the presence of black and white men together was a strong indicator of potential criminal activity. John Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, *Criminal Procedure Stories* 295 (Carol S. Steiker ed., Foundation Press 2006).

⁸⁵ *Terry*, 392 U.S. at 7.

⁸⁶ *Id.*

⁸⁷ *Id.* at 6-7.

flict great indignity and arouse strong resentment, and it is not to be undertaken lightly.⁸⁸

Since the Court found that Mr. Terry had been seized and searched, Fourth Amendment precedent required that police have "probable cause."⁸⁹ The Court, however, declined to apply this (relatively) high standard, stating that "we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which . . . as a practical matter could not be . . . subjected to the warrant procedure."⁹⁰ It held that the Fourth Amendment simply required the police conduct to be reasonable, which could be determined by balancing the government interest (investigating crime and officer safety) against the individual interest (privacy).⁹¹ The Court specifically noted that it was not abandoning the jurisprudence that a search is presumptively unconstitutional if there is no probable cause, but simply creating a limited exception.⁹²

Justice Douglas was the lone dissenter.⁹³ He observed that the probable cause standard was deeply rooted in the country's history and the Court's precedent.⁹⁴ Justice Douglas did not think the reasonableness balancing test was constitutionally sound because he thought the Fourth Amendment itself already balanced the relevant interests.⁹⁵ Douglas observed that there was no probable cause to arrest Mr. Terry before the search, because his crime, carrying a concealed weapon, had been dis-

⁸⁸ *Id.* at 16-17.

⁸⁹ *Id.* at 25-26.

⁹⁰ *Id.* at 20.

⁹¹ *Id.* at 21.

⁹² *Id.* at 27.

⁹³ *Id.* at 35-39 (Douglas, J. dissenting). Justice Thurgood Marshall had only recently joined the court. There is some evidence that he later regretted his vote with the majority. See John Q. Barrett, "Deciding the Stop and Frisk Cases: Look Inside the Supreme Court's Conference," 72 ST. JOHN'S L. REV. 749, 843 (1998) ("Justice Marshall, who as a newcomer to the Court was relatively uninvolved in the Court's internal arguments over the stop and frisk cases, all but stated in later cases that he had voted wrong in Terry.").

⁹⁴ *Terry*, 392 U.S. at 37 (Douglas, J. dissenting).

⁹⁵ *Id.* at 38-39.

covered during the search.⁹⁶ Thus, if before Mr. Terry had been searched, the police had gone to a magistrate and sought a warrant to search him, a judge would have had to deny the warrant.⁹⁷ Douglas wrote:

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.⁹⁸

V. THE *TERRY* COMPROMISE

In *Terry*, the Supreme Court did what it sometimes does when it is presented with an interpretation of the Constitution that seems both correct and politically untenable: it split the baby. The best known example in a criminal procedure case is the decision in *Miranda v. Arizona*.⁹⁹ The American Civil Liberties Union had argued that whenever a suspect was subject to police questioning, the Fifth Amendment's privilege against self-incrimination required that a lawyer be present. The Court's compromise, embodied in the "*Miranda* warnings," was that the suspect did have a right to a lawyer, but, after she was advised of the right, she could waive it immediately and proceed to police questioning absent a lawyer.¹⁰⁰ In *Terry*, the Court held, against the wishes of the law enforcement community,

⁹⁶ *Id.* at 35-36.

⁹⁷ *Id.*

⁹⁸ *Id.* at 38-39.

⁹⁹ 384 U.S. 436 (1966).

¹⁰⁰ *Id.* at 478-79.

that stops and frisks were searches and seizures, and thus were governed by the Fourth Amendment. Then, however, against Mr. Terry's assertion, it ruled for the first time that stops and frisks could be subject to a lower standard than probable cause; in this one specific (but far from rare) occurrence, the new standard was "reasonableness."

Then and now, the *Terry* decision has been widely heralded. The *New York Times*, in an editorial the day after the case was decided, said "[T]he Supreme Court's 8-1 decision . . . will help persuade policemen that the Court does not lie awake nights dreaming up ways to increase the hazards of their jobs."¹⁰¹ More recently, Professor Stephen Saltzburg described *Terry* as "a practically perfect doctrine."¹⁰²

So what's the problem? Justice Douglas's dissent essentially identified two major problems with the Court's analysis. First, it was inconsistent with all of the Court's previous interpretations of the Fourth Amendment. Second, it gave too much power to the police.

VI. STARE DECISIS

The majority opinion offered no settled jurisprudential reason for departing from the "warrant clause predominates" rule that had governed Fourth Amendment analysis. Rather, the Court's analysis was premised on its perception on the realities of police work in the mean months of 1967. The majority opinion claimed that, "as a practical matter," the probable cause clause could not govern stop and frisk law because the police had to act quickly to tame the streets.¹⁰³ If they were required to take the time to get a warrant, or even to wait for probable cause, bedlam might ensue.

Perhaps, Justice Douglas replied, but there is still the Constitution. He described the Court's legal rationale in support of searches and seizures without probable cause as "a mystery."¹⁰⁴

¹⁰¹ "Unreasonable" Still Stands, N.Y. Times, June 12, 1968, at 46.

¹⁰² Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 St. John's L. Rev. 911 (1998).

¹⁰³ *Terry*, 392 U.S. at 20.

¹⁰⁴ *Id.* at 35 (Douglas, J., dissenting).

He noted that the Court had “always used the language of ‘probable cause’” to assess the constitutionality of warrantless seizures of persons.¹⁰⁵ Douglas quoted Supreme Court precedent that described the probable cause requirement as having “roots that are deep in our history.”¹⁰⁶ In *United States v. Henry*, the Court stated, “as early American decisions both before and immediately after [the Fourth Amendment’s adoption] show, common rumor or report, suspicion or even ‘strong reason to suspect’ was not adequate to support a warrant for arrest. And that principle has survived to this day.”¹⁰⁷

That the principle did not survive past the summer day in 1967 that *Terry* was decided troubled Douglas not only for its practical consequences, but also as a matter of jurisprudence. Douglas noted that there might be a perceived need to give the police more power to “cope with modern forms of lawlessness.”¹⁰⁸ The process of changing the requirements of the Fourth Amendment, however, was not up to the Supreme Court; rather “it should be the deliberate choice of the people through a constitutional amendment.”¹⁰⁹

Sometimes liberal Supreme Court justices are described as being ends-justified or consequentialist in their analysis. The concern is that judicial activists (a term applied more frequently to progressive justices rather than conservative ones) ignore settled precedence, or even the Constitution, in order to achieve a particular result. The more compelling case, in *Terry*, is that the eight other justices did not accord the Constitution the respect that it was due. It is true that the Fourth Amendment makes it more, rather than less, difficult for the police to investigate crimes, and that if the Court had decided *Terry* the way that Justice Douglas wanted, there might be some diminution in the ability of the police to prevent crime. It is also true, however, that if the majority of the Court did not like that allocation between citizen’s rights and police power, they had no legal au-

¹⁰⁵ *Id.* at 36 n.3.

¹⁰⁶ *Id.* at 37 (Douglas, J., dissenting) (quoting *Henry v. United States*, 361 U.S. 98, 100).

¹⁰⁷ *Id.* at 37-38 (quoting *Henry*, 361 U.S. at 101).

¹⁰⁸ *Id.* at 38.

¹⁰⁹ *Id.*

thority to change it. The balance, as Justice Douglas pointed out, already had been struck in the Constitution.

VII. POLICE POWER

Mr. Terry was arrested for carrying a concealed weapon. The problem is that the police did not find out that he was carrying a concealed weapon until they had seized him, without probable cause, and searched him, without probable cause. The most salient fact for Douglas is that if, prior to the arrest, the police had gone to a magistrate and sought a warrant to search Mr. Terry for a concealed weapon, they wouldn't have gotten it because there was no probable cause. Now, however, as a result of the Court's decision, the police could search for a weapon without a warrant and without probable cause. To Douglas this meant that the *Terry* decision gave the police more power than a magistrate.¹¹⁰

Professor Ahkil Amar has characterized the majority's analysis of this issue as weak and noted that it never responded to this point of the Douglas dissent.¹¹¹ Perhaps the Court did not respond because Douglas was correct. The police, whom the Court described in another Fourth Amendment case as "engaged in the often competitive enterprise of ferreting out crime"¹¹² are allowed to use their own judgment about when they can detain a person who is, in the eyes of the law, innocent, and the standard that they use—reasonable suspicion—is lower than the magistrate's requirement of probable cause. It was not farfetched to imagine that the police would use *Terry* as a pretext to search in situations in which a magistrate—one might even say the Fourth Amendment—would not have allowed. And of course the police have enthusiastically engaged in such pretextual searches (and seizures), a practice the Supreme Court blessed in a later case.¹¹³

¹¹⁰ *Id.* at 36.

¹¹¹ Amar, *supra* note 2, at 1115.

¹¹² *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹¹³ *Whren v. United States*, 517 U.S. 806 (1996).

Justice Douglas noted “powerful hydraulic pressures . . . [that] water down constitutional guarantees and give the police the upper hand.”¹¹⁴ Again acknowledging the mean streets of the late 1960’s, he added that the pressure had “never been greater than it is today.”¹¹⁵ His concern, however, was that if the police could search and seize at their discretion, we enter a “new regime.”¹¹⁶ Now, more than forty years after Douglas made that prediction, we are fully there.

VIII. WHY THE *TERRY* DISSENT IS GREAT

Professor Mark Tushnet has described three characteristics that “great dissents” share: 1) they accurately predict the future, 2) they use rich rhetoric because they want their analysis to be remembered by future generations (as opposed to swaying contemporary courts), and 3) they “set out an account of democracy . . . that cannot fail to move the reader.”¹¹⁷ By all three of these measures, the Douglas dissent is great.

A. *The Douglas Dissent Predicts the Future*

Consider the inglorious progeny of *Terry*. It includes the blessing, by some federal courts, of racial profiling.¹¹⁸ It includes *Illinois v. Wardlow*, in which the Supreme Court held that *Terry* allows the police to detain people who only arouse suspicion because they happen to be in a high-crime area and they want to evade the police.¹¹⁹ It includes this list of factors that various federal courts have found constitute “reasonable suspicion” of drug couriers at airports:

Arrived late at night

Arrived early in the morning

¹¹⁴ *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases 98-99 (Mark Tushnet ed., 2008).

¹¹⁸ *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992). See generally David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work (2002).

¹¹⁹ 528 U.S. 119 (2000).

One of first to deplane

One of last to deplane

Deplaned in the middle

Used a one-way ticket

Used a round-trip ticket

Carried brand-new luggage

Carried a small gym bag

Traveled alone

Traveled with a companion

Acted too nervous

Acted too calm

Wore expensive clothing and gold jewelry

Dressed in black corduroys, white pullover shirt, loafers without socks

Dressed in dark slacks, work shirt, and hat

Dressed in brown leather aviator jacket, gold chain, hair down to shoulders

Dressed in loose-fitting sweatshirt and denim jacket

Walked rapidly through airport

Walked aimlessly through airport

Flew in to Washington National Airport on the LaGuardia Shuttle

Had a white handkerchief in his hand.¹²⁰

¹²⁰ United States v. Hooper, 935 F.2d 484, 499-500 (2d Cir. 1991) (Pratt, J., dissenting) (citing United States v. Sokolow, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting) (internal citations omitted)).

As troubling, the Supreme Court has extended its “reasonableness” analysis outside of the context of stop and frisk – despite its avowal in *Terry* that it was carving out a limited exception.¹²¹ Since *Terry*, reasonableness analysis has prevailed in cases involving drug testing,¹²² border searches,¹²³ police checkpoints,¹²⁴ and inventory searches,¹²⁵ among others. Indeed some scholars have interpreted the Court’s opinion in *United States v. Knights*, in which it declared “[t]he touchstone of the Fourth Amendment is reasonableness,”¹²⁶ as its effective abandonment of the “warrant clause predominates” jurisprudence.¹²⁷

This is the “new regime” of which Douglas warned. It is not “totalitarianism” but it is a “long step” down that path. The *Terry* doctrine is a major contributor to the widespread antipathy toward the police that many people in minority and low-income communities demonstrate, because they know that, in the words of the Douglas dissent, “the police can pick [a person] up whenever they do not like the cut of his jib.”¹²⁸

B. Memorable Rhetoric

In his dissent in *Terry*, Justice Douglas dropped the “t” bomb. He wrote, “To give the police greater power than a magistrate is to take a long step down the totalitarian path.”¹²⁹ To use the word “totalitarian,” in the middle of the cold war, to describe a U.S. Supreme Court ruling was more than a rhetorical flourish; it was a prediction of a future in which the United

¹²¹ *Terry*, 392 U.S. at 27.

¹²² *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

¹²³ *United States v. Ramsey*, 431 U.S. 606 (1977).

¹²⁴ *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

¹²⁵ *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (the only case listed here in which Court used reasonableness analysis and found search unreasonable).

¹²⁶ 534 U.S. 112, 118 (2001).

¹²⁷ See Kimberly S. Keller, *Privacy Lost: Comparing the Attenuation of Texas’s Article I, Section 9 and The Fourth Amendment*, 34 St. Mary’s L. J. 429, 432 (2003) (“In *United States v. Knights*, the Court emphasized its trend to shift focus from the ‘warrant requirement’ to the requirement of ‘reasonableness’”); Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in United States v. Knights*, 25 Harv. J.L. & Pub. Pol’y 1201, 1208-1212 (2002).

¹²⁸ *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

¹²⁹ *Id.* at 38.

States would use tactics more like those of its adversaries. If, as in Tushnet's account of great dissents, the writing is for future generations rather than present courts, the t-word rings, forty years later, loudly and clearly. The only thing that Justice Douglas appeared not to have anticipated, when he stated the "hydraulic" pressure to "water down constitutional guarantees"¹³⁰ during unsafe times is September 11, 2001.

The passage that invokes the specter of totalitarianism is not cited much in opinions by lower courts—one understands that judges might be reluctant to characterize their fellow jurists' decisions with such a strong word. In the academic literature, however—especially criminal procedure casebooks and law review articles—the line about the "long step down the totalitarian path" appears in virtually every account of *Terry*. This is not to say that the words are always cited approvingly; as mentioned above, the *Terry* majority opinion has been heralded by many scholars as an appropriate compromise. In these discussions, however, the t-word is ever present, like an echo.

C. Douglas's Account of Democracy

Justice Douglas's dissent is profoundly concerned with democracy. He believes that the Court's departure from probable cause would only be justified if it were "the deliberate choice of the people."¹³¹ Likewise, the last words of his opinion suggest that the expansion of police power authorized by the majority require a "full debate by the people of this country."¹³²

Though Douglas never seemed to restrain his rhetoric when writing from the bench, he wrote even more passionately away from the Court. In *Points of Rebellion*,¹³³ published two years after the *Terry* decision, Douglas praised America's promise of freedom in relation to totalitarian countries:

After an American has been in a totalitarian country for several months, he is greatly relieved when he reaches home. He

¹³⁰ *Id.* at 39.

¹³¹ *Id.* at 38.

¹³² *Id.* at 39.

¹³³ William O. Douglas, *Points of Rebellion* (RANDOM HOUSE 1970) (1969).

feels that bonds have been released and that he is free. He can speak above a whisper, and he walks relaxed and unguarded as though he were no longer being followed.¹³⁴

In the same essay, Douglas noted that America's freedom was under attack; he decried the growing authority of the government, particularly its tendency to empower police to oppress minorities, dissenters, and the poor through constant surveillance, investigations without due process, and other invasions of privacy. "[A] vast bureaucracy now runs the country," Douglas wrote, "irrespective of what party is in power."¹³⁵ Citing FBI wiretaps,¹³⁶ government employment screening,¹³⁷ and electronic surveillance,¹³⁸ Douglas expressed his fear that "Big Brother in the form of an increasingly powerful government . . . will pile the records high with reasons why privacy should give way to . . . law and order."¹³⁹

Douglas specifically noted race as a "source of dissent,"¹⁴⁰ pointing out that "[t]he constitutional battle of the Blacks has been won, but equality of opportunity has, in practice, not yet been achieved. There are many, many steps still necessary."¹⁴¹ Douglas wrote that "[p]olice practices are anti-Negro."¹⁴² He lamented the growing authority of police officers to make discretionary arrests in order to advance discriminatory agendas:

Many cities make being poor a crime. A man who wanders about looking for a job is suspect; and he and his kind are arrested by the thousands each year. The police, indeed, use "vagrancy" as the excuse for arresting people on suspicion—a wholly unconstitutional procedure in our country.¹⁴³

¹³⁴ *Id.* at 3.

¹³⁵ *Id.* at 54.

¹³⁶ *Id.* at 29-30.

¹³⁷ *Id.* at 16-29.

¹³⁸ *Id.* at 30-31.

¹³⁹ *Id.* at 29.

¹⁴⁰ *Id.* at 44.

¹⁴¹ *Id.* at 94.

¹⁴² *Id.* at 45.

¹⁴³ *Id.* at 47.

The Justice further complained that gross violations of privacy are accepted even in the investigation of minor transgressions: "[A] person on welfare has no Fourth Amendment rights: the police are empowered to kick down the door of his home at midnight without any search warrant in order to investigate welfare violations."¹⁴⁴ Douglas asked, "Does social and economic justice always serve a secondary role in our society?"¹⁴⁵ After proposing a series of modifications to social policies, he predicted an imminent social and political revolution, stating that "[t]here are only two choices: A police state in which all dissent is suppressed or rigidly controlled; or a society where law is responsive to human needs."¹⁴⁶ He predicted "an explosive political regeneration"¹⁴⁷ demanding "measurable change."¹⁴⁸

In Justice Douglas's view, reflected in his dissent in *Terry*, when one comes to America he does have to be afraid of the police. In his subsequent account of democracy, if the United States ever got to the point where the police had too much power, the people would demand "change." It is perhaps still too early to know whether Douglas was right on this score. His faith in the people, and their desire to be free, is unquestionably inspiring. Time will tell whether this faith was justified.

CONCLUSION

Two years before *Terry*, in *Miranda v. Arizona*,¹⁴⁹ the Supreme Court got radical, at least according to the way the police perceived its opinion. The Court required the police to give suspects a mini-lecture in criminal procedure: Before interrogating suspects, the police had to warn them that talking to the police was not in their best interests. There were the predictable concerns that law enforcement would be undermined, but now, more than forty years later, these concerns appear to have been misplaced. The police, resourceful and adaptable, still manage

¹⁴⁴ *Id.* at 71.

¹⁴⁵ *Id.* at 65.

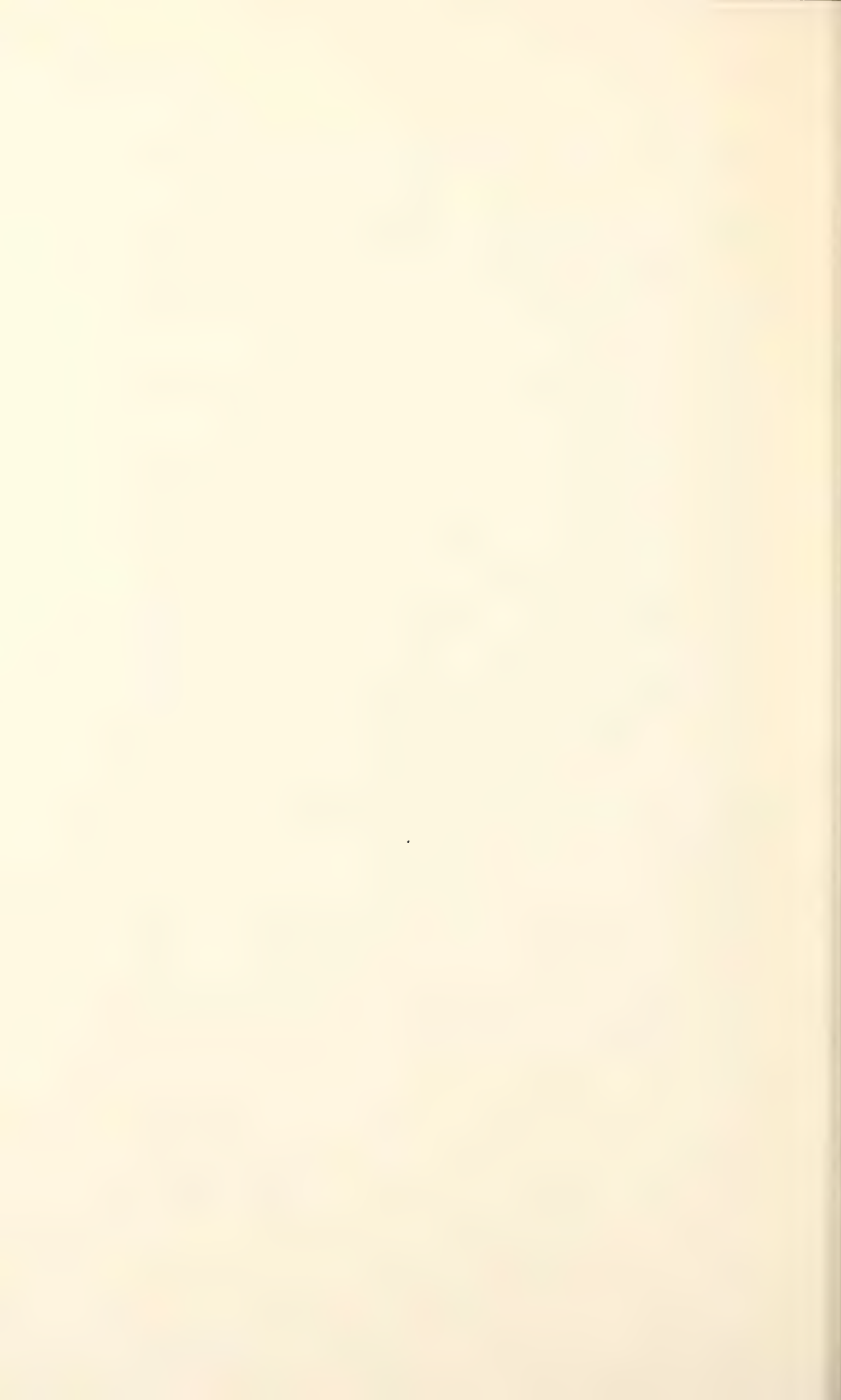
¹⁴⁶ *Id.* at 92.

¹⁴⁷ *Id.* at 97.

¹⁴⁸ *Id.* at 95.

¹⁴⁹ 384 U.S. 436 (1966).

to enforce the criminal law, including getting suspects to talk even after they have received the *Miranda* warnings. So one lesson of the aftermath of *Miranda* is that the police are capable of adapting to the requirements of the Bill of Rights, even when those requirements seem explicitly to hinder law enforcement's ability to investigate crime. If Justice Douglas had written the majority opinion in *Terry*, the police still could have watched Mr. Terry and his associates; they just would not have been able to forcibly detain them until they had probable cause that a crime was going to be committed. It is true that the ability to intervene earlier in the process might thwart some crimes, but that crime-prevention benefit has to be measured against the widespread animosity towards the police that the stop-and-frisk doctrine has caused. In some low-income and minority communities, many people strongly dislike the police, and one important reason for this is *Terry*. It makes these citizens less likely to cooperate with the police, which is ultimately as much a detriment for public safety as for democracy. As rhetorical wars—the “war” on drugs and the “war” on terrorism—seem to lead the United States further down the “long path” to totalitarianism, the full greatness of the Douglas dissent has yet to be appreciated. The only question is whether the ultimate appreciation will be as a cautionary tale that was heeded, better late than never, or as the prediction of a frightening future, which now has arrived.



WARRANTS FOR WEARING A WIRE: FOURTH AMENDMENT PRIVACY AND JUSTICE HARLAN'S DISSENT IN *UNITED STATES V. WHITE*

Catherine Hancock*

A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future age.¹

INTRODUCTION

Justice Harlan's dissent in *United States v. White*² appealed to a future age when all members of society will be allowed to "carry on" their "private discourse freely, openly, and spontaneously," without enduring the risk of government "eavesdroppers prying into their private affairs" by warrantless monitoring of their conversations through the use of "wired" listeners.³ Justice Harlan's dissents comprised "nearly half" of the body of his judicial opinions,⁴ but his *White* dissent was unusual for several

* Geoffrey C. Bible & Murray H. Bring Professor of Constitutional Law, Tulane Law School. I want to thank Tom Clancy for the honor of being invited to present an early draft of this article at the 2009 Fourth Amendment Symposium, sponsored by the National Center for Justice and the Rule of Law at the University of Mississippi School of Law. I am grateful for the research assistance provided by Julia Farinas ('10) and Heather Hendrix ('09). I want to dedicate this article to my colleague Brooke Overby, who died suddenly on August 5 at the age of 49. Brooke was a wonderful teacher who inspired her students to be excited about contracts and commercial law. She was a dedicated scholar who enjoyed the respect and affection of her colleagues and she contributed memorably to the Tulane Law School community. It is a tragedy that her pragmatic voice and genial wit are now lost to us forever.

¹ ALAN BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT* 3 (1974) (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928)).

² 401 U.S. 745, 768 (1971) (Harlan, J., dissenting).

³ *Id.* at 789-90. This Article uses the terms "bugged" or "wired" "listeners" to refer to people with electronic devices that transmit a conversation to a monitoring government agent who may also be recording the conversation.

⁴ TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* viii (1992) (noting that during 16 years, Harlan wrote 613 opinions, "more than any other justice of his era," including 296 dissents and 149 concurrences). See also Nathan Lewin, *Justice Harlan: "The Full Measure of the Man,"* 58 A.B.A. J. 579,

reasons. It did not support the government's position,⁵ it advocated the overruling of precedent,⁶ and it demonstrated how Harlan could change his mind. The government's position in *White* relied heavily on a prior Harlan opinion involving electronic surveillance.⁷ But in his *White* dissent, Harlan observed that his own earlier approach "misconceive[d] the basic issue" by focusing "on the interests of a particular individual rather than evaluating the impact of a practice on the sense of security that is the true concern of the Fourth Amendment's protection of privacy."⁸ If Harlan's thinking had changed before the Warren Court era ended, he could have authored a majority opinion on the *White* issue, instead of dissenting for a future age.⁹ At the time of his *White* dissent, he could not have known that it would be one of the last opinions he would write.¹⁰

583 (June 1972) (observing that Harlan would circulate a separate opinion when he could not agree with a draft majority or dissent, because he "felt it his duty to state his own reasons for reaching his result," and that "often" the author of the draft would respond with modifications that "might" lead Harlan to withdraw his separate opinion).

⁵ See Norman Dorsen, *John Marshall Harlan*, in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1401, 1406-08 (Leon Friedman & Fred L. Israel eds., 1995) [hereinafter THE JUSTICES] (noting Harlan's dissenting opinions supporting the government's position, including *Griffin v. Illinois*, 351 U.S. 12, 29 (1956); *Douglas v. California*, 372 U.S. 353, 360 (1963); *Mapp v. Ohio*, 367 U.S. 643, 672 (1961); *Malloy v. Hogan*, 378 U.S. 1, 14 (1964); *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968); *Fay v. Noia*, 372 U.S. 391, 448 (1963); *Henry v. Mississippi*, 379 U.S. 443, 457 (1965)). See also *Miranda v. Arizona*, 384 U.S. 436, 207 (1966) (Harlan, J., dissenting); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (Harlan, J., dissenting).

⁶ *White*, 401 U.S. at 795 (referring to *On Lee v. United States*, 343 U.S. 747 (1952), and concluding, "I would hold that *On Lee* is no longer good law").

⁷ Brief for the United States, at 10, 13, 16, 17, 18, 19, 24, *White*, 401 U.S. 745 (No. 13), 1969 WL 120170 (relying on *Lopez v. United States*, 373 U.S. 427 (1963)).

⁸ *White*, 401 U.S. at 788 n.24. See *infra* notes 328-30 and accompanying text.

⁹ See *White*, 401 U.S. at 775 (recognizing that four members of the Court, not including Harlan, were ready to overrule *On Lee* when *Lopez* was decided in 1963). Cf. *id.* at 755 (Brennan, J., concurring in the result) (noting agreement with protection of privacy interest, and voting for reversal only on non-retroactivity grounds); *id.* at 756 (Douglas, J., dissenting); *id.* at 795 (Marshall, J., dissenting). But see *id.* at 745 (plurality opinion) (rejecting protection for privacy interest and also ruling against defendant on non-retroactivity grounds); *id.* at 754 (Black, J., concurring in the judgment) (supplying fifth vote for rejecting protection for privacy interest, relying on his lone dissent in *Katz v. United States*, 389 U.S. 347, 364 (1967), arguing that Fourth Amendment does not protect any conversations).

¹⁰ See *id.* at 745 (plurality opinion) (decided April 5, 1971); YARBROUGH, *supra* note 4, at 335 (describing events that led to Harlan's death on December 29, 1971).

The value of Harlan's dissent grew as it receded into the past, as one of the best examples in the literary genre of judicial pedagogy in Fourth Amendment jurisprudence. Many clues in his opinion helped to explain the evolution of "privacy" precedents during the 50 years between the Court's first surreptitious surveillance case and the *White* decision.¹¹ His analysis brought to life the doctrinal dramas of the decade before *White*, when the Warren Court's precedents expanded the Fourth Amendment's boundaries while dissolving the iron grip of the Taft Court's limiting inscriptions in *Olmstead v. United States*.¹² Harlan authored some of those precedents,¹³ and dissented in others.¹⁴ But his *White* dissent was a testament to his support for all the Court's decisions envisioning the Fourth Amendment as a "regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure."¹⁵

Harlan's dissent embodied his attempt to prevent the Court's voice from becoming "only a voice of power, not of reason."¹⁶ His opinion provided a tour de force display of the workings of a passionate intellect. More than half of its over 9,000 words were devoted to demonstrating how the 1952 precedent of

¹¹ See *Gouled v. United States*, 255 U.S. 298 (1921); Tracey Maclin, *Hoffa v. United States: Secret Agents in Private Spaces*, in *CRIMINAL PROCEDURE STORIES* 190-94 (Carol S. Steiker, ed., 2006) (identifying and analyzing *Gouled* as the first such decision).

¹² 277 U.S. 438 (1928).

¹³ See Dorsen, *supra* note 5, at 1412, 1417 (noting Harlan's authorship of majority opinions ruling for defendants in Fourth Amendment cases, including, *inter alia*, *Gior-denello v. United States*, 357 U.S. 480 (1958); *Jones v. United States*, 357 U.S. 493 (1958); *Simmons v. United States*, 390 U.S. 377 (1968); *Mancusi v. DeForte*, 392 U.S. 354 (1968)). See also *Spinelli v. United States*, 393 U.S. 410 (1969); *Whiteley v. Warden*, 401 U.S. 560 (1971).

¹⁴ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting); *Wong Sun v. United States*, 371 U.S. 471, 498 (1963) (Harlan, J., dissenting on probable cause issue); *Camara v. Municipal Court*, 387 U.S. 523, 546 (1967) (Clark, J., dissenting) (joined by Harlan); *Berger v. New York*, 388 U.S. 41, 89 (1967) (Harlan, J., dissenting).

¹⁵ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974). See Philip B. Heymann, in *JOHN MARSHALL HARLAN II, ASSOCIATE JUSTICE OF THE SUPREME COURT 1955-1971: REMEMBRANCES BY HIS LAW CLERKS* (Norman Dorsen & Amelia Ames Newcomb, eds., 2001), reprinted in 27 J. SUP. CT. HIST. 138, 152 (2002) [hereinafter *REMEMBRANCES*] (observing that Harlan "followed the practice, with rare exceptions, of treating a decision from which he had dissented as fully entitled to his personal deference, as a precedent, after six months").

¹⁶ *Mapp*, 367 U.S. at 686 (Harlan, J., dissenting).

*On Lee v. United States*¹⁷ was undermined by many subsequent precedents, leaving its doctrine “wholly open for reconsideration.”¹⁸ The painstaking analysis of the living death of precedent was a Harlan trademark,¹⁹ and his dissection of the history of *On Lee*’s fossilization symbolized his commitment to enabling Fourth Amendment doctrine to change with integrity vis-à-vis its past meanings. In this respect, Harlan’s dissent served as a sharp contrast to the *White* plurality’s analysis, which illustrated the Court’s ability to resurrect precedent through retroactive immunization of doctrine from the vicissitudes of historical change.²⁰

In his *White* dissent, Harlan demonstrated how judges may discover and interpret the Fourth Amendment principles that “were either dimly perceived or not fully worked out” in an earlier era.²¹ He encouraged judges to guard against the danger that either “risk analysis” or the “expectations” approach “can, ultimately, lead to the substitution of words for analysis.”²² He urged judges to recognize their responsibility for the imposition of risks and expectations upon the citizenry,²³ and to assume that the answers to a “privacy” problem are to be found in the Fourth Amendment “tapestry,” in which the “privacy” cases are interwoven with the “strands of doctrine” in the “search” cases.²⁴ His own words illustrated his quest for a wide-ranging and nuanced analysis of precedents as the necessary antidote to reliance on catchphrases or ahistorical understandings of doctrine. For Harlan, it was the whole of Fourth Amendment jurisprudence that required translation and explication in *White*. No precedent was an island, entire of itself. Every decision was a piece of the Fourth Amendment continent that could be understood only in the light of all the decisions that had come be-

¹⁷ 343 U.S. 747 (1952).

¹⁸ *United States v. White*, 401 U.S. 745, 780 (1971) (Harlan, J., dissenting). See discussion *infra* Part III.B.

¹⁹ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Harlan, J., concurring) (providing the exegesis for a “respectful burial” of *Betts v. Brady*, 316 U.S. 455 (1942)).

²⁰ Cf. discussion *infra* Part III.B.1 (examining *White* plurality’s analysis of *On Lee*).

²¹ *White*, 401 U.S. at 780.

²² *Id.* at 786.

²³ *Id.*

²⁴ *Id.* at 783.

fore, and all that came after, including the concurrences and dissents that accompanied each one.²⁵

Part I of this Article focuses on the portrayal of the *White* case in the introduction of the plurality opinion authored by Justice White, and takes a closer look at the facts of the government drug sting, the arguments of the parties, and the thicket of relevant precedents. Part II.A examines the concurrences by Justices Harlan and White in *Katz v. United States*,²⁶ the decision in which the Court formally overruled *Olmstead*, holding that conversations in a telephone booth are protected against electronic “bugging,” and that such surveillance is subject to the warrant requirement.²⁷ The ideas expressed in these concurring opinions are useful to compare because they foreshadowed the approaches used in Justice Harlan’s dissent and in Justice White’s plurality opinion in *White*. Part II.B considers the first half of Harlan’s dissent, in which he explained the historical reasons for the death of *On Lee* as controlling authority for *White*. Part II.C analyzes the second half of Harlan’s dissent, where he addressed “the desirability of saddling” the expectation and risk of wired listeners upon society. His analysis centered upon his assessment of the nature of this surveillance technique and the “likely extent of its impact” upon an individual’s sense of security.²⁸ Part III explores Harlan’s understanding of the “expectations of privacy” concept after *Katz* and before *White*, and concludes with final reflections upon the impact of the *White* decision and the legacy of Harlan’s dissent.

²⁵ Cf. BARTH, *supra* note 1, at 14 (characterizing the Court as “a continuing body, linked to the past and to the future, in the deliberations of which predecessors are colleagues whose voices are never to be stilled,” and quoting Justice Edward White’s advocacy of “judicial continuity” in *Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting)).

²⁶ 389 U.S. 347 (1967).

²⁷ *Id.* at 353, 358-59. See Transcript of Oral Argument at 34, *Katz*, 389 U.S. 347 (No. 35) (describing *Katz*’s \$300 fine for his conviction for transmitting wagering information by telephone); *id.* at 41 (noting that *Katz* was “one of the best handicappers in the country” for basketball games).

²⁸ *White*, 401 U.S. at 786.

I. THE GOVERNMENT'S DRUG STING AND THE THICKET OF PRECEDENTS

Two named characters appeared on the stage of the *White* plurality's opinion, but the decision provided no details to explain their actions or relationship. The defendant, James A. White, was sentenced to 25 years in prison for unspecified drug crimes. The government informer, Harvey Jackson, carried a concealed radio transmitter during his conversations with White, and these transmissions were monitored and overheard by unnamed federal agents.²⁹ On four occasions, their conversations took place in Jackson's home. As one agent watched the men from his observation post inside a kitchen closet, he saw, "through slightly open doors," the first heroin package change hands; during later episodes he saw deliveries of cash get counted.³⁰ This agent listened to the conversations "live," whereas two other agents heard them via the radio transmitter in a car across the street from Jackson's house.³¹ The agents monitored four other conversations, including two in Jackson's car, one in a restaurant, and one in White's home. The agents testified about these conversations at White's trial, over the objection of his defense counsel. Jackson was not available to testify.³² No other evidence was mentioned in the *White* plurality opinion. When White appealed his conviction, the circuit court reversed, finding the transmitted conversations were inadmissible under the Fourth Amendment.³³

²⁹ *Id.* at 746-47 (plurality opinion). See *United States v. White*, 405 F.2d 838, 840 n.2 (7th Cir. 1969) (en banc) (describing the "kel set" used by Jackson as a "small transistorized device which transmits voices or sound" to a radio transmitter receiving unit); Transcript of Oral Argument at 3, *White*, 401 U.S. 745 (No. 13) (noting that the device was "put on the chest under the clothing" of the informant, and that the device "will transmit for a mile or so").

³⁰ *White*, 405 F.2d at 840.

³¹ See *White*, 401 U.S. at 746-47; Transcript of Oral Argument, *supra* note 29, at 5; Brief for the United States, *supra* note 7, at 3-8.

³² *White*, 405 F.2d at 842; Brief for the United States, *supra* note 7, at 8 (noting that the government was unable to locate and produce Harvey Jackson as a witness, and that Jackson's wife testified that she had seen her husband the "previous evening" but "did not know where to locate" him on the day of trial).

³³ *White*, 405 F.2d at 848.

The *White* plurality assigned three errors to the circuit court. First, that court interpreted *Katz* as overruling *On Lee*. Second, the circuit court interpreted the Fourth Amendment as prohibiting the introduction of the agents' testimony under the circumstances of the *White* case. Thus, the circuit court "misinterpreted both the *Katz* case and the Fourth Amendment."³⁴ Third, that court granted a new trial "without advert[ing] to the fact that the transactions" in *White* "had occurred before *Katz* was decided," and thereby "erred in applying the *Katz* case to events that occurred before that decision was rendered."³⁵ This description of multiple errors cast a subtle aura of clumsiness upon the circuit court's decision, and additional references to the circuit court's mistaken "understandings" about doctrine further magnified this aura.³⁶

The *White* plurality's dry recitation of the circuit court's errors did not disclose the reasoning for that court's interpretative choices about *Katz* and *On Lee*. Nor did the plurality explain the understandable reason for the circuit court's failure to "advert" to *Desist v. United States*,³⁷ which declared *Katz* to be non-retroactive, and which was not decided until two months after the circuit court's decision in *White*.³⁸ Immediately after deciding *Desist*, the Court granted review in *White*³⁹ because the justices were ready for another debate about an issue that had provoked disagreements in divided opinions for almost twenty years.⁴⁰ Ultimately, they preferred to issue an advisory opinion

³⁴ *White*, 401 U.S. at 747.

³⁵ *Id.*

³⁶ *See id.* at 749, 750, 754.

³⁷ 394 U.S. 244 (1969).

³⁸ *Compare id.* at 244 (decided March 24, 1969) with *White*, 405 F.2d at 838 (decided January 7, 1969) (making no reference to any government argument about non-retroactivity in anticipation of the *Desist* holding).

³⁹ *White*, 405 F.2d at 838, *cert. granted*, 394 U.S. 957 (1969). *See White*, 401 U.S. 745 (argued on November 10, 1969, and reargued on October 20, 1970, presumably because the Court was divided 4 to 4 during the 1969 Term). *Compare* Fred Graham, *Abe Fortas*, in IV THE JUSTICES, *supra* note 5, at 1451, 1462-64 with Dennis Hutchinson, *Harry A. Blackmun*, in IV THE JUSTICES, *supra* note 5, at 1607, 1608-13 (explaining how Justice Fortas resigned on May 16, 1969, and was not replaced with Justice Blackmun until June 9, 1970).

⁴⁰ *See, e.g., On Lee v. United States*, 343 U.S. 747 (1952); *id.* at 758 (Frankfurter, J., dissenting); *id.* at 765 (Burton, J., dissenting); *id.* at 762 (Douglas, J., dissenting); Lopez

on the question concerning the viability of *On Lee*,⁴¹ instead of waiting for the opportunity to review that issue in a case tried after *Katz* was decided.⁴²

The *White* plurality's description of the government's sting operation was more succinct than those provided in the circuit court's opinion and in the briefs and arguments in the Supreme Court. There were at least six agents involved in an operation that lasted for four weeks before ending in *White*'s arrest on a street in Chicago.⁴³ *White* made three deliveries of heroin to Jackson, and always collected cash payments later, sometimes in two installments.⁴⁴ After making the first delivery of heroin to Jackson's home, *White* made two subsequent deliveries during arranged meetings in Jackson's car. *White* collected cash payments three times at Jackson's home, and Jackson brought other payments to *White*'s home and to the restaurant.⁴⁵ Jackson's wire enabled the agents to listen to numerous incriminating remarks by *White* during each delivery and collection event.⁴⁶ The agents tailed *White* and Jackson by car during the

v. United States, 373 U.S. 427 (1963); *id.* at 441 (Warren, C.J., concurring in the result); *id.* at 446 (Brennan, J., dissenting).

⁴¹ See Donald L. Doernberg, "Can You Hear Me Now?: Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's First Amendment Jurisprudence," 39 IND. L. REV. 253, 282 (2006) (observing that "almost the entire opinion is advisory" in *White*). Cf. Transcript of Oral Argument, *supra* note 29, at 14, 15 (urging the Court "not to decide the case on retroactivity but on the importance of the law question" because of "the importance of law enforcement of getting" that question decided, and noting that the government had twenty-two cases pending in the Court which involved the *White* issue, none of which had been tried before *Katz*).

⁴² See *White*, 401 U.S. at 754. Cf. Transcript of Oral Argument, *supra* note 29, at 23 (arguing that *Desist* did not apply to *White* because *Desist* held that *Katz* was prospective only "as to things that *Katz* departed from in previous holdings" of the Court, and that under the law before *Katz*, the defendant would prevail on the Fourth Amendment claim "without *Katz*"); *White*, 401 U.S. at 793-95 (Harlan, J., dissenting) (endorsing the argument that *Desist* did not apply to *White*).

⁴³ *White*, 405 F.2d at 840-42.

⁴⁴ *Id.*

⁴⁵ *Id.* (noting that Harvey Jackson paid \$1,360 for the first sale of "one good ounce" of heroin, \$1,250 for "two more ounces," and \$2,250 for a third "package"; he agreed to pay \$2,250 for the fourth delivery that did not occur because of *White*'s arrest). See Brief for Respondent at 3, *White*, 401 U.S. 745 (No. 13), 1969 WL 120169.

⁴⁶ See *White*, 405 F.2d at 840-42. Cf. Transcript of Oral Argument, *supra* note 29, at 11 (noting that Jackson called *White* once from a telephone booth to arrange a meeting and brought an agent into the booth to listen to the call).

second and third delivery events.⁴⁷ A similar pattern was observed each time. One agent watched as White picked up his source, then dropped off his source and picked up Jackson, and finally passed along the package from the source. During their third observed meeting, White and his source were arrested at a bus stop, just as the source handed him a briefcase containing heroin.⁴⁸

These facts about the sting operation in *White* illustrated the way in which the Court could have implemented the defendant's proposed warrant requirement for the use of wired listeners like Jackson.⁴⁹ Counsel for the government in *White* observed, "[N]early all of these informants are themselves addicts that are used by the investigatory body to make the [drug] purchase[s]."⁵⁰ Assuming that government agents could obtain the assistance of an informant to gather probable cause evidence by making a drug purchase without wearing a wire, then the agents could use this evidence to obtain judicial approval for continuing the sting with a wire on the informant during future meetings with the targeted drug seller. According to the Court's discussion in *Berger v. New York*, in order to conduct a wiretap or plant "bugs," government agents would need to obtain a judicial order based on probable cause, which would establish the parameters for the "nature, scope or duration" of the electronic surveillance.⁵¹ Only this type of judicial preauthorization system would satisfy the Fourth Amendment.⁵² Defense counsel in *White* relied on *Berger* to argue that similar judicial safeguards should be required for using a transmission "bug" on a wired listener.⁵³ But *Berger* was only one decision in a thicket of relevant precedents.

⁴⁷ *White*, 405 F.2d at 841-42.

⁴⁸ *Id.* at 842. Cf. Brief for the United States, *supra* note 7, at 3-8 (indicating that the source was White's co-indictee).

⁴⁹ Brief for Respondent, *supra* note 45, at 2; Transcript of Oral Argument, *supra* note 29, at 24-25.

⁵⁰ Transcript of Oral Argument, *supra* note 29, at 4.

⁵¹ *Berger v. New York*, 388 U.S. 41, 54-60, 63 (1967).

⁵² Maclin, *supra* note 11, at 202.

⁵³ Brief for Respondent, *supra* note 45, at 11, 12, 20.

The Court's earliest Fourth Amendment ruling against the government in an informant case came in *Gouled v. United States*, in which a false-friend informant pretended to make a social call on a defendant in his office, and in his absence, carried away an incriminating paper.⁵⁴ The Court treated this event as a search and seizure "by stealth" that should be equated with a search and seizure conducted by means of force or coercion.⁵⁵ More than thirty years later, the *On Lee* Court held that a similar pretense did not constitute an unlawful search and seizure when the false-friend informant was a wired listener whose conversation with the defendant was transmitted to a monitoring government agent with a "receiving set" that allowed him to hear it.⁵⁶

The *On Lee* Court relied on *Goldman v. United States*, which held that no search or seizure occurred when unseen agents used a device to listen to magnified conversations through an office wall.⁵⁷ The *Goldman* ruling, in turn, extended the logic of *Olmstead*, which held that agents who listened to wiretapped conversations on home and office telephones committed no search or seizure.⁵⁸ The *Olmstead* Court reasoned that the text of the Fourth Amendment could not be interpreted either to treat intangible conversations as tangible "effects" or "things," or "to apply the words search and seizure as to forbid hearing or sight."⁵⁹ The Court observed that the tapped telephone wires were "not part of" the defendant's "house or office," and the conduct of the government agents did not fit any of the three categories of searches and seizures recognized in prior cases.⁶⁰ Those categories included only a seizure of the "person," a seizure of tangible material "effects," or a "physical invasion" of a person's "house or 'curtilage' for the purpose of making a

⁵⁴ 255 U.S. 298 (1921).

⁵⁵ *Id.* at 305-06. See Maclin, *supra* note 11, at 190-92.

⁵⁶ *On Lee v. United States*, 343 U.S. 747, 749, 751 (1952). But see *supra* note 40 (citing *On Lee* dissents).

⁵⁷ *Goldman v. United States*, 316 U.S. 129, 131-32, 135 (1942). But see *id.* at 136 (Murphy, J., dissenting); *id.* at 136 (Stone, J. and Frankfurter, J., filing statements that they would have joined a Court majority to overrule *Olmstead*).

⁵⁸ *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928).

⁵⁹ *Id.* at 465.

⁶⁰ *Id.* at 466.

seizure.”⁶¹ Subsequent precedents viewed *Olmstead* as relying on a “trespass” rationale because the Court observed that the wires were tapped “without trespass upon any property.”⁶²

Almost twenty years after *On Lee*, the Court took up another electronic eavesdropping case in which no informant was involved. In *Silverman v. United States*,⁶³ the Court found that the interception of conversations could violate the Fourth Amendment, thus implicitly recognizing that the human ear could commit the seizure of a conversation, and that an intangible conversation could receive the constitutional protection given to tangible “effects” or “things.”⁶⁴ However, the Court found it unnecessary to reconsider the narrow holdings of *Olmstead* and *Goldman* because the agents in *Silverman* committed a “physical invasion” into a “constitutionally protected area” that was missing in the earlier cases.⁶⁵ The agents had inserted a microphone into the wall of a house and monitored the conversations of the individuals within.⁶⁶ Soon thereafter, in *Lopez v. United States*, the Court encountered a case in which an official-turned-undercover-agent used only a recording device when conversing with a defendant who had tried to bribe him during an earlier encounter.⁶⁷ Instead of treating *On Lee* as controlling precedent, the Court determined that the recording was admiss-

⁶¹ *Id.* Cf. Amsterdam, *supra* note 15, at 382 (noting that *Olmstead* reasoned both that “the ear cannot commit a search or a seizure” and that “the tap of the telephone wire was not an intrusion into any area protected by the Constitution in favor of the phone owner”, because the telephone wires “are not part of his house or office”). But see *id.* at 485, 487 (Butler, J., dissenting) (reasoning that “tapping the wires and listening in by the officers literally constituted a search for evidence”); *id.* at 471-85 (Brandeis, J., dissenting); *id.* at 469-71 (Holmes, J., dissenting).

⁶² See, e.g., *Silverman v. United States*, 365 U.S. 505, 510-11 (1961) (citing *Olmstead*, 277 U.S. at 457).

⁶³ *Id.*

⁶⁴ *Id.* at 511-12. See *United States v. White*, 401 U.S. 746, 768, 775 n.9 (1971) (Harlan, J., dissenting) (noting that *Silverman*’s “unspoken premise” was articulated in *Wong Sun v. United States*, 371 U.S. 471, 485 (1963), namely “that the Fourth Amendment may protect against the overhearing of verbal statements”).

⁶⁵ *Silverman*, 365 U.S. at 508-10.

⁶⁶ *Id.* at 509, 512 (describing how the “spike mike” device made contact with the heating system of the house, which acted as a sounding board). Cf. *Clinton v. Virginia*, 377 U.S. 458 (1964) (applying *Silverman* to require exclusion of conversations monitored by use of a spike mike that was stuck in the wall with penetration comparable to thumb tack).

⁶⁷ *Lopez v. United States*, 373 U.S. 427, 430 (1963).

ible because no unseen government agent monitored the conversation, and because the recording was used at trial to corroborate the official's testimony as to what he had heard.⁶⁸

In the Court's last informant cases before *White*, a trilogy of decisions on the same day reached the same result, finding that no search or seizure occurred. In *Lewis v. United States*, an undercover agent accepted the defendant's "invitation" to enter his home in order to conduct an illegal drug transaction, and testified later concerning their conversations.⁶⁹ The *Lewis* Court distinguished *Gouled* because the *Lewis* agent neither saw, nor heard, nor took anything not contemplated by the defendant as part of that transaction; the Court distinguished *Silverman* because no unseen government agents monitored the conversations.⁷⁰ In *Hoffa v. United States*,⁷¹ the false-friend informant was not monitored, and thus the defendant's "misplaced confidence" that the informant would not be a government "plant" and would not disclose incriminating conversations to his government supervisors "was not protected by the Fourth Amendment."⁷² In *Osborn v. United States*, the false-friend informant recorded the defendant's conversation, like the official-turned-undercover-agent in *Lopez*.⁷³ However, the *Osborn* Court did not rest its decision upon the "foundation of the Court's opinion in *Lopez*," but upon "the narrower compass" of the *Lopez* dissent and concurrence, which approved of the use of a recording device by an informant-agent when that use was authorized ahead of time by judicial order, as in *Osborn*.⁷⁴

Faced with the "highly uncertain" state of the governing principles for the use of wired listeners and of electronic surveillance generally,⁷⁵ the government counsel in *White* said almost

⁶⁸ *Lopez*, 373 U.S. at 438. Cf. Maclin, *supra* note 11, at 201-02, 203-04.

⁶⁹ 385 U.S. 206 (1966).

⁷⁰ *Id.* at 210, 212.

⁷¹ *Hoffa v. United States*, 385 U.S. 293 (1966).

⁷² *Id.* at 302. Cf. Maclin, *supra* note 11, at 206-11.

⁷³ 385 U.S. 323 (1966).

⁷⁴ *Id.* at 327-29.

⁷⁵ Kent Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 202 (1968) (explaining that "the primary conclusion to be drawn about the constitutionality of use of electronic devices by a participant, or with a participant's

nothing about *On Lee*, arguing instead that *Lopez*'s holding concerning a recording device should be expanded and applied to a transmission device.⁷⁶ In the government's view, the wired informant in *White* consented to the government's monitoring of his conversations with the defendant. That fact distinguished *Katz*, which did not involve an informant.⁷⁷ Relying on *Hoffa*, the government argued the *White* defendant must have recognized the risk that the informant Jackson could be an unwired government informant who would disclose his conversations to government agents.⁷⁸ Thus, the risk of disclosures by the reporting informant in *Hoffa* could be equated with the risk of transmission disclosures to unseen agents by the wired informant in *White*.⁷⁹

The defense counsel's brief in *White* relied on *Gouled*, *Silverman*, *Osborn*, *Berger*, and *Katz*, and reasoned that hiding a transmission "bug" on the informant Jackson was no different from planting a "bug" in *White*'s house. This government inva-

consent, to record or transmit the words of a non-consenting party is that the governing principles are now highly uncertain").

⁷⁶ See Brief for the United States, *supra* note 7, at 14-16, 18-19, 21, 24-25, 28 (referring to arguments based on *Lopez*); *id.* at 28 (citing *On Lee* as an example of a rule that "electronic surveillance without a trespass did not violate the Fourth Amendment," and circuit courts following the *On Lee* rule on the *White* issue before *Katz*); Transcript of Oral Argument, *supra* note 29, at 14 (mentioning these decisions).

⁷⁷ See Brief for the United States, *supra* note 7, at 10; Transcript of Oral Argument, *supra* note 29, at 11.

⁷⁸ Brief for the United States, *supra* note 7, at 9, 14.

⁷⁹ See *id.* at 20 (citing Justice White's concurrence in *Katz*). See also *infra* text accompanying note 134. At oral argument, the government counsel also emphasized that, "this is not an *On Lee* situation, where the government used an old friend after indictment of the defendant to extract an admission or confession of a past event," but a situation in which the agents were listening "to the event itself happen, to the crime being committed, in the consummation of a commercial transaction" between parties whose relationship should not be "protected in the sense of a right of expectation of privacy." Transcript of Oral Argument, *supra* note 29, at 8, 10. The government counsel may have sought to distinguish the use of the wired informant in *White* from the *On Lee* "situation" because the *On Lee* defendant was indicted, and at the time *White* was argued and decided, the Sixth Amendment right to counsel had been extended to the pre-indictment arrest phase by *Escobedo v. Illinois*, 378 U.S. 478 (1964). Therefore, the protections of *Massiah v. United States*, 377 U.S. 201 (1964), which prohibited the use of an informant or undercover government agent to deliberately elicit statements from an indicted defendant, arguably applied to an arrested defendant and possibly to others. Cf. Greenawalt, *supra* note 75, at 198 (observing that *Escobedo* does not reveal "how far *Massiah* will be expanded in regard to statements elicited by informers").

sion required compliance with the warrant requirement under *Berger*.⁸⁰ The government's reliance on *Hoffa* was deemed "misplaced" because "no electronic interception or transmission" of conversations occurred there, and because the *Hoffa* Court noted that the unwired informant was not transmitting to "sur-reptitious eavesdroppers."⁸¹ The *Lopez* decision was distinguished on the basis of its facts and narrow rationales that had no application in *White*, where an unseen government agent did monitor the conversation, and the transmitting device did capture more than what the wired informant heard.⁸² As for *On Lee*, defense counsel commented at oral argument, "I don't know if the government is urging that *On Lee* is still good law or whether they are not."⁸³ The defense counsel also argued the defendant "would prevail" even without relying on *Katz*, if the Court would "turn back the hands of time" and consider the case under the law as it "was before *Katz*."⁸⁴ These arguments provided the seeds of the ideas that Justice Harlan developed by in his *White* dissent.

II. HARLAN'S DISSENT: CHALLENGING THE DEAD HAND OF THE PAST

In Harlan's "preliminary observations" about the issue in *White*, his dissent exhibited a dramatic contrast to the plurality's low-key summary of the case as an occasion for the correction of a wayward lower court.⁸⁵ Harlan explained that numerous electronic devices had made "technologically feasible the Orwellian Big Brother," and that "tens of thousands of times each year, throughout the country," informants and undercover officers used such devices, including wire transmitters that

⁸⁰ Brief for Respondent, *supra* note 45, at 9, 11-13.

⁸¹ *Id.* at 14 (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966)).

⁸² *Id.* at 16-17.

⁸³ Transcript of Oral Argument, *supra* note 29, at 28. Cf. *United States v. White*, 405 F.2d 838, 847 (7th Cir. 1969) (en banc) (indicating that "[t]he government's principal reliance is placed on the decision in *On Lee*").

⁸⁴ Transcript of Oral Argument, *supra* note 29, at 23 (responding to questions about non-retroactivity of *Katz*).

⁸⁵ *White*, 401 U.S. at 769 (Harlan, J., dissenting).

broadcast conversations, free from judicial scrutiny.⁸⁶ Harlan saw the issue of unregulated wired listeners as one of great magnitude, because of the prevalence of this surveillance technique and because “the factors that must be reckoned with . . . are . . . subtle and complex,” doctrinally difficult to weigh “in the Fourth Amendment balance,” and the source of “sharp differences of opinion both within and without the judiciary.”⁸⁷

However, Harlan had no hesitancy in expressing his conclusion that the 1952 decision in *On Lee* had been allowed to “govern official behavior . . . in spite of the subsequent erosion of its doctrinal foundations.”⁸⁸ In his view, *On Lee* was overdue for reassessment, and his analysis of “important constitutional developments since *On Lee*” led him to conclude “that *On Lee* can no longer be regarded as sound law.”⁸⁹ These developments occurred during the almost twenty year period between *On Lee* and *White*, and illustrated the Court’s altered “perception of the scope and role of the Fourth Amendment.”⁹⁰ In essence, subsequent precedents impeached *On Lee* before it could be overruled as a formality, and therefore the Court was required to consider the *On Lee* problem anew.⁹¹

As for *Katz*, Harlan emphasized that this decision was not a turning point in the demise of *On Lee*, and that the doctrine of *On Lee* had become “wholly open for reconsideration . . . since well before *Katz* was decided.”⁹² Harlan defined his initial mission as the exercise of “tracing carefully the evolution of Fourth Amendment doctrine” in decisions after *On Lee*, in order to liberate the debate in *White* from the dead hand of unsound doc-

⁸⁶ *Id.* at 768, 770 (quoting ALAN WESTIN, *PRIVACY AND FREEDOM* 131 (1967)). *Cf. id.* at 770 n.2 (quoting WESTIN, *supra*, at 131) (noting that electronic devices are used in investigations of crimes involving narcotics, gambling, prostitution, corruption of public officials, extortion, and conspiracy; they are also used “to unearth ‘political crimes,’” by agents who attend the public and private meetings of suspect groups).

⁸⁷ *Id.* at 770-71.

⁸⁸ *Id.* at 769.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 780. *Cf. id.* at 769 (observing also that “it requires no discussion of the holding in *Katz*, as distinguished from its underlying rationale as to the reach of the Fourth Amendment, to comprehend the constitutional infirmity of *On Lee*”).

trine.⁹³ He defined his second mission as the explication of the reasons why, "under our system of government, as reflected in the Constitution," the Court should not "impose on our citizens the risks of the electronic listener or observer" without the protection of a warrant requirement.⁹⁴

Harlan's dissent candidly addressed one of the most vexing difficulties involved in interpreting the privacy precedents during the years before *White*, which derived from the Court's tradition of silence concerning the implications of departures from the logic of *Olmstead*, *Goldman*, and *On Lee*. These cases became symbols of the Court's efforts "to live as long as it could with decisions made in the past,"⁹⁵ and citations to the rationales or holdings in *Olmstead* and *On Lee* appeared in decisions that implicitly retreated from those holdings or rationales.⁹⁶ This custom of using *Olmstead*-observant language, while relying on *Olmstead*-evasive reasoning, made it extremely difficult to identify the cases in which the law actually changed, and this difficulty could persist for years.⁹⁷

Harlan expected that a "discerning lawyer" would recognize this difficulty,⁹⁸ and would adapt to it by characterizing the status of any privacy issue in scrupulously nuanced terms, as when he identified "the question of whether a conversation could be the subject of a 'seizure' for Fourth Amendment purposes" as

⁹³ *Id.* at 773.

⁹⁴ *Id.* at 786.

⁹⁵ BARTH, *supra* note 1, at 20 (referring to consequence of Court's "fidelity to *stare decisis*" generally in the era before *White*).

⁹⁶ See, e.g., *Silverman v. United States*, 365 U.S. 505, 512 (1961) (declining to re-examine *Goldman* but also declining to go beyond it "by even a fraction of an inch").

⁹⁷ See, e.g., Brief of Petitioner at 10, *Katz v. United States*, 389 U.S. 347 (1967) (No. 35), 1967 WL 113605 (noting how "[a]fter *Silverman*, much confusion existed as to whether this Court had abandoned the physical trespass test enunciated in *Goldman* or whether *Silverman* represented the new philosophy of the Court"); *White*, 401 U.S. at 775 n.9 (observing that *Silverman* implicitly "would seem to have eliminated any lingering uncertainty" that verbal communication was protected by the Fourth Amendment, and that this "unspoken premise of *Silverman*" was clearly articulated in *Wong Sun v. United States*, 371 U.S. 471, 485 (1963)).

⁹⁸ *White*, 401 U.S. at 776 (criticizing the government's brief in *White* for citing *Lopez* as a reaffirmation of *On Lee*, because to "the discerning lawyer," *Lopez* "could only give pause, not comfort" and could "hardly be thought to have nurtured the questionable rationale" of *On Lee*).

“yet an unanswered if not completely open question” in 1952.⁹⁹ Harlan refused to pretend that any precedent could be treated as a simple artifact whose meaning was synonymous with its result, and he assumed the relationship between precedents could not be ascertained merely by observing that one case cited another.¹⁰⁰ He further expected observers to recognize that the Court’s custom of citing a case “without disavowal of its holding” was entirely consistent with “the failure to reaffirm” the reasoning of that case.¹⁰¹

In order to speak accurately about the ambiguities of the Court’s long, slow journey away from *Olmstead*, Harlan liked to speak metaphorically about precedent, and to personify the *Olmstead* progeny in order to track the stages of their declining health. Regarding the fatal prognosis for *Olmstead* and *On Lee*, Harlan declared that no decision after 1963 gave the “breath of life to the reasoning that led to the *On Lee* and *Olmstead* results,” and so “it required little clairvoyance to predict the demise of the basic rationale of *On Lee* and *Olmstead*.”¹⁰² As for the timing of *Olmstead*’s demise, Harlan declared it was given a “quiet burial” in *Berger* before *Katz* gave it “last rites.”¹⁰³

Harlan treated the concurrences and dissents of his colleagues as essential sources for assessing the degree of “erosion”

⁹⁹ *Id.* at 773 & n.5 (noting that the *On Lee* Court did not reach this question, the answer to which “was still unclear after *Goldman*” in 1942).

¹⁰⁰ *Id.* at 777.

¹⁰¹ *Id.* (characterizing the significance of the citation of *On Lee* in his *Lopez* majority opinion in these terms). *Cf.* Transcript of Oral Argument, *supra* note 27, at 25 (revealing that when government counsel in *Katz* argued that “in the *Berger* case [the Court] did cite *Goldman*,” Justice Black responded, “I don’t think – they indicated [that] opinion was to be valid. Those cases were cited because they were somewhere in the realm.”).

¹⁰² *White*, 401 U.S. at 777. *See also id.* at 775-76 (noting that although the *Lopez* Court “declined to follow the course” of “sounding the death knell for *Olmstead* and *On Lee*,” four members of that Court “were prepared to pronounce *On Lee* and *Olmstead* dead,” reasoning that “[t]he pyre . . . had been stoked by decisions like *Wong Sun* . . . and . . . *Silverman*”) (citations omitted).

¹⁰³ *Id.* at 780 (observing that even “[i]f *Berger* did not flatly sound a dirge for *Olmstead*, it articulated principles that led Mr. Justice Douglas, by way of concurrence, to comment on its quiet burial”). *See also id.* (concluding that “[a]t most [*Katz*] was a formal dispatch of *Olmstead*” and that *Katz* thereby “freed from speculation what was already evident, that *On Lee* was completely open to question”).

in the “doctrinal foundations” of *Olmstead* and *On Lee*.¹⁰⁴ He assumed that opinions for Court majorities would not attempt to reconcile their *Olmstead*-observant language with their *Olmstead*-evasive reasoning. Therefore, each Court opinion needed to be examined through the lens of the accompanying presentations of justices who had the freedom to speak with greater candor and clarity about “the undercurrents” of doctrinal evolution that drew into question “the vigor of earlier precedents.”¹⁰⁵ Harlan valued concurrences and dissents because he wrote many of his own,¹⁰⁶ and his concurrence in *Katz* foreshadowed some of the ideas he would develop in his *White* dissent. Even more dramatically, Justice White’s concurrence in *Katz* staked out the answer he planned to offer when the issue in *White* arrived at the Court. Without joining issue with each other, each justice claimed that a different tacit understanding existed on the Court concerning the proper interpretation of Justice Stewart’s ambiguous opinion for the *Katz* majority.¹⁰⁷

¹⁰⁴ See, e.g., *id.* at 769, 778 n.12, 780 (citing *On Lee* dissents, *Lopez* dissent, and *Berger* concurrence).

¹⁰⁵ *Id.* at 778, 784. Cf. *id.* at 769 (describing how *On Lee* “continued to govern official behavior” involving the warrantless use of wired listeners “in spite of the subsequent erosion of its doctrinal foundations”).

¹⁰⁶ Lewin, *supra* note 4, at 583 (observing that Harlan became “among the most prolific of the Court’s opinion writers” because of the number of his concurrences and dissents).

¹⁰⁷ Compare *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring) with *id.* at 362-64 (White, J., concurring). Cf. David A. Sklansky, *Katz v. United States: The Limits of Aphorism*, in CRIMINAL PROCEDURE STORIES 247, 248 (Carol S. Steiker, ed., 2006) (observing that “the most striking thing” about the *Katz* Court’s reasoning “was how vague and ambiguous it was,” and that the “affirmative case” for the holding “was left largely unstated”); THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 59 (2008) (noting that the *Katz* Court’s “embrace of privacy was not without reservation and [Justice] Stewart did little to explain what he meant by the term”); Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 S. CT. REV. 133, 137-38 (identifying ambiguities in *Katz* opinion, and noting that because of the Harlan concurrence, “it seems clear that the [majority] opinion is deliberately ambiguous”).

*A. Foreshadowings of the White Debate in the Katz Concurrences*1. Justice Harlan's Anchoring of *Katz* in Privacy Precedents

The implicit goal of Justice Harlan's *Katz* concurrence was to anchor the majority's holding in the precedential seabed of the Court's decisions.¹⁰⁸ But his portrayal of precedents was complicated by his penchant for elaborating upon the emerging connections between the privacy decisions. He displayed the same penchant in his *White* dissent, in which he opined that *Katz* added "no new dimension to the law."¹⁰⁹ Yet Harlan was provoked sufficiently by the *Katz* majority's opinion to offer his own explication of the result. His first step was to validate the *Katz* defendant's original and narrower argument,¹¹⁰ stating:

I join the opinion of the Court, which I read to hold *only* (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area . . . is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.¹¹¹

Harlan saw no reason to cast doubt upon the continuing validity of the Court's tradition of making case-by-case additions

¹⁰⁸ *Katz*, 389 U.S. at 360-62.

¹⁰⁹ *White*, 401 U.S. at 780 (Harlan, J., dissenting) (citations omitted).

¹¹⁰ *Katz*, 389 U.S. at 349-50 (quoting the defendant's questions presented, namely whether a public telephone booth is a constitutionally protected area and whether a physical intrusion into such an area is necessary for a search and seizure). See Transcript of Oral Argument, *supra* note 27, at 1, 3 (explaining that when FBI agents discovered that *Katz* was making calls from a bank of three telephone booths, they put a stereophonic tape recorder on the roof of the middle booth, taped each of the microphones to the back of one of the booths, put an "out of order" sign on the third booth, and turned on the recorder whenever a radio report from the agent tailing *Katz* predicted *Katz*'s imminent arrival).

¹¹¹ *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (emphasis added) (citing *Hester v. United States*, 265 U.S. 57 (1924) (Fourth Amendment does not provide protection from visual surveillance in an "open field"); *Weeks v. United States*, 232 U.S. 383 (1914) (Fourth Amendment protects the home)).

to the category of "constitutionally protected areas."¹¹² Moreover, his invocation of this tradition grounded the *Katz* holding in precedents that involved traditional, non-electronic types of government intrusions, and thereby linked the government's surveillance in *Katz* to the warrant requirement.¹¹³ Not until *Berger* did the Court explain how the warrant system and the probable cause requirement might be applied feasibly to wiretapping.¹¹⁴ Neither Harlan's concurrence nor the *Katz* Court's opinion revealed that the defense counsel's original position assumed that protection of the defendant's conversations would require an absolute Fourth Amendment prohibition on recording them.¹¹⁵ Only in the reply brief and at oral argument did defense counsel propose that the warrant system should be imposed on the government's bugging of the telephone booth.¹¹⁶ Indeed, this argument was sufficiently novel that some lawyers and media commentators expressed surprise at its success in *Katz*.¹¹⁷

Harlan's reliance on the "constitutionally protected area" concept implicitly rejected the defense counsel's position at oral argument, which proposed that it was "the wrong initial in-

¹¹² CLANCY, *supra* note 107, at 54 n.49 (quoting partial list of protected areas in *Lanza v. New York*, 370 U.S. 139, 143 (1962), including a house, a business office, a store, a hotel room, an apartment, an automobile, and a taxicab).

¹¹³ See *Amsterdam*, *supra* note 15, at 388 (observing that the *Katz* Court "simply takes up the warrant requirement from the dwelling-entry cases and applies it routinely to the bugging of a public telephone booth"). Compare Brief for Respondent at 17-19, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113606 (arguing that even if the booth is a constitutionally protected area, it should not receive the same warrant protection as a home), with Transcript of Oral Argument, *supra* note 27, at 28 (arguing that the Fourth Amendment was designed to protect the public from trespass and that it arises from the right of the person to exclude others from an area under the person's control, which is not a characteristic of a public telephone booth).

¹¹⁴ Sklansky, *supra* note 107, at 234-36 (explaining the reasons for the "considerable doubt regarding the validity of surveillance warrants" before the *Silverman* era).

¹¹⁵ See *id.* at 242-45 (analyzing the new arguments of *Katz*'s defense counsel in the reply brief and at oral argument concerning the need for a warrant).

¹¹⁶ See Reply Brief for Petitioner at 2, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113607; Transcript of Oral Argument, *supra* note 27, at 4.

¹¹⁷ See Sklansky, *supra* note 107, at 249-50. Cf. Samuel Dash, *Katz - Variations on a Theme by Berger*, 17 CATH. U. L. REV. 296, 303 & n.41 (1968) (describing the lack of a federal statute regulating "bugging" in the era before *Berger* and *Katz*, and the small number of state statutory provisions relating to this type of surveillance); SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, *THE EAVESDROPPERS* 430-37 (1959).

quiry” to ask whether any area is “constitutionally protected,”¹¹⁸ and that the right to privacy should “follow[] the individual” so that a conversation in any setting might deserve Fourth Amendment protection.¹¹⁹ To bolster this proposal, defense counsel emphasized that “the very first item of protection in the Fourth Amendment is ‘persons,’” which “lends credence” to the view “that privacy does follow the individual.”¹²⁰ The *Katz* Court echoed these sentiments in declaring that, “[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures,”¹²¹ and “the Fourth Amendment protects people, not places.”¹²² The Court even endorsed the defense counsel’s criticism of the “constitutionally protected area” doctrine, agreeing it provided no “talismanic solution to every Fourth Amendment problem.”¹²³

Harlan must have recognized the inconsistency between the Court’s validation of these defense arguments and his own narrower interpretation of the *Katz* holding. But whatever he may have thought of the defense counsel’s broad and vaguely worded propositions, he was determined to reaffirm the precedents challenged by defense counsel, even when the *Katz* opinion remained silent about these challenges. For example, *Katz*’s defense counsel was asked at oral argument whether the Fourth Amendment should protect a conversation in a field from interception by means of a parabolic microphone one mile away.¹²⁴

¹¹⁸ Transcript of Oral Argument, *supra* note 27, at 5; Reply Brief for Petitioner, *supra* note 116, at 4.

¹¹⁹ Transcript of Oral Argument, *supra* note 27, at 7. Cf. Sklansky, *supra* note 107, at 237, 241 (contrasting the defense counsel’s original questions presented with counsel’s later shift away from them at oral argument).

¹²⁰ Transcript of Oral Argument, *supra* note 27, at 12.

¹²¹ *Katz v. United States*, 389 U.S. 347, 359 (1967).

¹²² *Id.* at 351.

¹²³ *Id.* at 351 n.9. Compare Transcript of Oral Argument, *supra* note 27, at 5, 7, with *Katz*, 389 U.S. at 350 (refusing “to adopt this formulation of the issues” using the idea of the “constitutionally protected area,” and observing that “the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area’”) and *id.* at 351 (opining that the effort to decide “whether or not a given ‘area,’ viewed in the abstract, is ‘constitutionally protected’” only “deflects attention” from the problem). Cf. Amsterdam, *supra* note 15, at 357 (observing that *Katz* “rejects the concept of ‘constitutionally protected areas’ as the exclusive formula of fourth amendment coverage”).

¹²⁴ Transcript of Oral Argument, *supra* note 27, at 5.

The “open fields” doctrine granted no protection from visual surveillance, and Katz’s defense counsel argued that the “open fields” doctrine should be overruled so that both visual and conversational privacy could be protected.¹²⁵ Without mentioning this defense argument, Harlan’s concurrence referred twice to the “open fields” doctrine as established law.¹²⁶

In the second step of his concurrence, Harlan acknowledged the Court’s maxim concerning the protection of “people not places,” but noted that the protection for “people” generally required a reference to a “place.”¹²⁷ Then he described his understanding of “the rule that ha[d] emerged from prior decisions”—a “twofold requirement” demanding “first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹²⁸ These memorable phrases soon “came to be used by the Court as the predominant measure for the scope of the Fourth Amendment’s protections” in most contexts.¹²⁹ But Harlan used these words as a framework for rejecting the government counsel’s argument that privacy can exist only in areas in

¹²⁵ *Id.* at 5, 11 (arguing, on behalf of defendant, for overruling *Hester v. United States*, 265 U.S. 57 (1924), because it should make no difference, with regard to the right to conversational privacy, “whether you’re in an open field or in the privacy of your own home”). *But see* Transcript of Oral Argument, *supra* note 27, at 16-17 (arguing, on behalf of the government, that people in the open fields should remain unprotected equally from visual surveillance and from a parabolic microphone because they are in a “public area” and privacy is restricted to “some area in which there is a private interest”).

¹²⁶ *Katz*, 389 U.S. at 360, 361 (Harlan, J., concurring) (contrasting protected telephone booth with unprotected open fields, and noting that “conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable,” without mentioning the problem of the parabolic microphone).

¹²⁷ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

¹²⁸ *Id.* at 361. *Cf.* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 822 (2004) (observing that Harlan saw his “reasonable expectation of privacy framework” as a restatement of existing law”).

¹²⁹ CLANCY, *supra* note 107, at 60. For possible sources of the phrase “reasonable expectation of privacy,” see Brief for Respondent, *supra* note 113, at 15 (arguing that “[t]he rights of privacy . . . must be measured in terms of the reasonable expectations of a person”), and Transcript of Oral Argument, *supra* note 27, at 16 (revealing how Justice Fortas repeatedly used the phrase “reasonably expect” in his questioning).

which the speaker has a private interest in the premises, never in a public area.¹³⁰

In Harlan's view, the government's interpretation of the concept of "constitutionally protected areas" was both narrower and more rigid than Harlan's own interpretation, and it was grounded in reasoning that ignored the precedents of *Silverman*, *Osborn*, *Berger* and others.¹³¹ Those cases no longer supported the idea that "the Fourth Amendment was designed to protect the public from trespass by law enforcement officers."¹³² Like the other justices in the *Katz* majority, Harlan wished to distinguish the protection of people from the protection of places, but for a different purpose. He wished to affirm the Court's broad concept of "constitutionally protected areas" while contradicting the government's proposition that it was only the legal right to exclude others from private premises that automatically gave rise to privacy for conversations.¹³³ As one counterexample, Harlan noted that a speaker's "statements" made in his home but exposed to the "plain view" of outsiders should not be protected, echoing the agreement of both counsel at oral argument that the Fourth Amendment would not protect a speaker who used a "loud enough voice" to be heard by someone outside his home when the windows were open.¹³⁴ By exhibiting "no intention" to keep his conversation to himself, this person exhibited no "actual" expectation of privacy.¹³⁵ Additionally, Harlan reasoned that although conversations "in the open" usually would not be protected, they should be protected in a "temporarily private place," like *Katz*'s telephone booth or a taxicab, in which momentary "freedom from intrusion" could be

¹³⁰ Transcript of Oral Argument, *supra* note 27, at 16-17.

¹³¹ See discussion *infra* Part II.B.2.

¹³² Transcript of Oral Argument, *supra* note 27, at 28. See also discussion *infra* Part II.B.2 (discussing pre-*Katz* precedents).

¹³³ Transcript of Oral Argument, *supra* note 27, at 28.

¹³⁴ *Katz v. United States*, 389 U.S. 347, 361; Transcript of Oral Argument, *supra* note 27, at 7. Accord *id.* at 27 (agreeing, on behalf of the government, that no protection should exist "if a man stood at the window of his home and talked to somebody outside in the garden in such a loud tone that people on the sidewalk could hear it").

¹³⁵ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

expected, even if a legal right to exclude did not exist.¹³⁶ These contrasting results could be characterized as scenarios involving different doctrinal judgments about the expectations that “society is prepared to recognize as ‘reasonable.’”¹³⁷

Another foreshadowing of Harlan’s *White* dissent appeared in the end of his *Katz* concurrence, where he noted that the “overruling” of *Olmstead* had already occurred, as part of “the course of development evinced” during the previous six years in majority opinions from *Silverman* to *Berger*.¹³⁸ In Harlan’s view, *Olmstead*’s holding “essentially rested on the ground that conversations were not subject to the protections of the Fourth Amendment,”¹³⁹ and *Silverman* “established that interception of conversations reasonably intended to be private could constitute a ‘search and seizure.’”¹⁴⁰ Once *Olmstead* was impeached, only *Goldman* remained to be re-examined in *Katz*.¹⁴¹ Harlan agreed that *Goldman* should be overruled, observing that its holding was “bad physics as well as bad law,” because “reasonable expectations of privacy may be defeated by electronic as well as physical invasion.”¹⁴² In his *White* dissent, Harlan took a similar view of *On Lee* as a precedent whose time for re-examination and formal repudiation was overdue.

¹³⁶ *Id.* (citing *Rios v. United States*, 364 U.S. 253 (1960), for privacy interest in taxi cab, observing that it is irrelevant that a telephone booth is “accessible to the public” when not in use); *id.* at 352 (quoting the *Katz* majority concerning the assumption of privacy exercised by a person who “shuts the door behind him, and pays the toll that permits him to place a call”).

¹³⁷ *Id.* at 361 (Harlan, J., concurring).

¹³⁸ *Id.* at 362 n.* (citing *Wong Sun v. United States*, 371 U.S. 471 (1963), *Berger v. New York*, 388 U.S. 41 (1967), and *Osborne v. United States*, 385 U.S. 323 (1966)). *Cf.* Transcript of Oral Argument, *supra* note 27, at 9 (revealing Justice Harlan’s questions whether *Olmstead* “already has been” overruled, “[w]ith a strong *sub silentio*” in *Berger*) (relying on Dr. George R. Conyne, legal historian at the University of Kent at Canterbury, for voice identification of Justice Harlan’s voice on October 11, 2009, using recording of oral argument in *Katz*, available at http://www.oyez.org/cases/1960-1969/1967/1967_35/argument).

¹³⁹ *Katz*, 389 U.S. at 362 n.* (Harlan, J., concurring).

¹⁴⁰ *Id.* at 361-62.

¹⁴¹ *Id.* at 362 (noting that the *Silverman* Court found it unnecessary to re-examine *Goldman*).

¹⁴² *Id.* Justice Harlan’s concurrence ended with the point that the *Katz* majority’s opinion did not foreclose the future recognition of specific exceptions to the requirement of a warrant. *Id.*

2. Justice White's Proposal—What *Katz* Left Undisturbed

Justice White's concurrence in *Katz* included a footnote in which he declared that *Hoffa*, *Lopez*, *Osborn*, and *On Lee*—all of which involved undercover agents or informants—remained “undisturbed” by the *Katz* decision.¹⁴³ His reasoning implicitly constructed the foundation for the reasoning of his plurality opinion in *White*. Notably, Justice White's summary of the results in these precedents made no reference to the rationales used by the Court to explain the lack of Fourth Amendment protection for the conversations in each case. Instead, he characterized each of these precedents in broad terms, according to the method by which the government obtained the “evidence.” As Justice White declared:

In previous cases, which are undisturbed by today's decisions, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police [in *Hoffa* (1966)]; (2) by a recording device hidden on the person of such an informant [in *Lopez* (1963) and *Osborn* (1966)]; and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location [in *On Lee* (1952)].¹⁴⁴

Justice White then followed this summary with three key sentences, which implicitly linked together the “risk” rationale of *Hoffa* with the recording scenarios of *Lopez* and *Osborn*, and most importantly, with the transmission scenario of *On Lee*. He reasoned as follows:

When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his

¹⁴³ *Id.* at 362 n.** (White, J., concurring).

¹⁴⁴ *Id.* (citations omitted).

hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case [*Katz*] deals with an entirely different situation, for as the Court emphasizes the [defendant] "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.¹⁴⁵

Justice White's collective invocation of *Hoffa*, *Lopez*, *Osborne*, and *On Lee* served to stack these precedents together as bricks in a small wall of doctrine, cemented together with his endorsement of the common doctrinal ground they shared in being "undisturbed" by *Katz*. Without descriptions of their accompanying rationales, the results in these decisions were portrayed implicitly as per se rules, which impression was enhanced by the enumerated, "black letter" style of Justice White's recitation. The ahistorical character of this singular wall of precedents was obscured by the simplicity of Justice White's promise that none of these cases needed to be reconsidered in the light of whatever meanings might be assigned to the *Katz* majority's opinion.

Justice White's inclusion of *On Lee* in this quartet of cases implicitly extended the decision's legitimacy, in spite of the *On Lee* Court's reliance on *Olmstead* and *Goldman*, now both overruled. The reference to *On Lee* also invited judges and lawyers to focus on *On Lee*'s relationship to *Katz*, rather than its relationship to all the pre-*Katz* precedents that might have "disturbed" it. Without this invitation, observers might not have noticed whether or not the *On Lee* decision was cited in Justice Stewart's *Katz* opinion. The fact that Stewart did not cite *On Lee* might be taken to imply either that *On Lee* was irrelevant to the *Katz* issue, or that Stewart ignored *On Lee* because of its controversial status as a member of the dying *Olmstead* family of cases. Justice White's reference to *On Lee* implied that the *Katz* Court's silence meant that *On Lee* was alive, and had been alive all along.

¹⁴⁵ *Id.* (citations omitted).

However, Justice White's most significant statement was his pairing of the small wall of "undisturbed" informant precedents with his recommended "logical and reasonable extension" of *Hoffa's* ascribed rationale to the scenario of the wired informant in *On Lee*. By offering up this proposal concerning the lack of need for Fourth Amendment protection against "unreliable associates" who are planted government informants, Justice White appeared to suggest that *Hoffa's* rationale could retroactively justify *On Lee's* result. His final assurance, that *Katz* involved an "entirely different situation" from the informant precedents, deflected attention away from consideration of the question whether the reasoning of *Katz* or the pre-*Katz* cases might be relevant to an endorsement of the "extension" of *Hoffa's* "risk" analysis to the scenario of the wired listener.

Justice White's closing assurance also suggested that there was no need to consider the significance of the Court's repeated distinctions between the use of unwired listeners, like those in *Hoffa* and *Lewis* who simply reported back to their government supervisors, and the use of listeners like those in *On Lee*, *Lopez*, and *Osborn*, who possessed recording or transmitting devices. Implicitly, Justice White's comments signaled to observers that the "electronic eavesdropping" precedents he left unmentioned, such as *Berger* and *Silverman*, as well as the "search" cases of the same era, were irrelevant to the assessment the need for judicial regulation of the wired listeners used in *On Lee* and *White*.

Justice White's views in his *Katz* concurrence encapsulated the core arguments that he would make in his *White* plurality opinion. The only Justice from the Warren Court who joined his opinion in *White* was Justice Stewart, the author of the *Katz* opinion.¹⁴⁶ During the years between *Katz* and *White*, Justice White's assurances about the "undisturbed" status of *On Lee* and *Lopez*, and his proposed extension of *Hoffa's* logic to justify the preservation of the *On Lee* holding, would be noticed. In the

¹⁴⁶ *Id.* at 348. See Leon Friedman, *Byron R. White*, in IV THE JUSTICES, *supra* note 5, at 1575 (observing that Professor Philip Kurland described the 1971 term as "the year of the Stewart-White Court – because [Justices Stewart and White] voted with the majority in over ninety percent of the decisions that year").

White litigation, the circuit court dissenters and the government counsel relied on Justice White's *Katz* concurrence to advocate the constitutionality of the unregulated use of wired listeners.¹⁴⁷

One key aspect of Justice White's concurrence in *Katz* later captured the attention of the circuit court judges, the government litigators in the Supreme Court, and the two justices who had not served on the *Katz* Court, Justice Blackmun and Chief Justice Burger. Justice White raised the question whether *Katz* had overruled *On Lee*, and determined that *On Lee* remained "undisturbed."¹⁴⁸ In order to escape from the various premises concealed within Justice White's frame, Justice Harlan spent more than half of his *White* dissent explaining why Justice White's question about *On Lee* was wrong, and what the right questions might be.

B. Reconstructing the Past: The Unrecognizable World of On Lee

The first half of Justice Harlan's dissent focused on the goal of explaining why "*Katz* added no new dimension to the law" with regard to the viability of *On Lee*.¹⁴⁹ Harlan concluded that despite the *Katz* Court's "formal dispatch of *Olmstead*," it "was already evident that *On Lee* was completely open to question" before the Court reached its decision.¹⁵⁰ Harlan's evidence for the death of *On Lee* included the privacy precedents that revealed the slowly degrading authority of *On Lee* starting in the early 1960s, which precedents also established three "sound

¹⁴⁷ *United States v. White*, 405 F.2d 838, 848, 850-51 (7th Cir. 1969) (en banc) (Castle, J., dissenting); Brief for the United States, *supra* note 7, at 9, 12, 14, 16, 17. See also *White*, 405 F.2d at 851, 852 (Hastings, J., dissenting) (arguing that *On Lee* must be treated as "controlling and dispositive" until "it is set aside by the Supreme Court"). But cf. *id.* at 843, 847 (majority opinion) (noting that it was unclear how *On Lee* could have been "undisturbed" by *Katz*, given that *On Lee* had relied on *Olmstead*, which was overruled by *Katz*, and given that the Supreme Court had "on other occasions completely eroded the decisional basis of *On Lee*"); *id.* at 843-44 (observing that it was not clear why "*Katz* would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging" as in *Hoffa*, and that it was difficult "to believe that such a meaningless form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*").

¹⁴⁸ See Transcript of Oral Argument, *supra* note 29, at 23.

¹⁴⁹ *United States v. White*, 401 U.S. 745, 745 (1971) (Harlan, J., dissenting).

¹⁵⁰ *Id.* at 768, 780.

general principles for application of the Fourth Amendment that were either dimly perceived or not fully worked out at the time of *On Lee*.¹⁵¹ These three general principles were: (1) “that verbal communication is protected by the Fourth Amendment;” (2) “that the reasonableness of a search does not depend on the presence or absence of a trespass;” and (3) “that the Fourth Amendment is principally concerned with protecting interests of privacy, rather than property rights.”¹⁵² For Harlan, “the primacy” of a fourth general principle emerged in his examination of the search cases during the same era: that “official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement.”¹⁵³

1. *On Lee*’s Trespass Rationale and Its Jurisprudential Identity Before *White*

Harlan began his “exposition of the dynamics of the decline of the trespass rationale underlying *On Lee*” with a simplified version of that rationale, explaining that Justice Jackson’s opinion rejected the defendant’s contention that the “deception” of the wired informant “vitiates” the defendant’s “consent to his entry on the premises.”¹⁵⁴ Thus, “in the absence of a trespass, no constitutional violation had occurred.”¹⁵⁵ Harlan could have supplied more details about the intricacies of the trespass analysis in the *On Lee* opinion to illustrate his point that “*On Lee* rested on common-law notions and looked to a waning era of Fourth Amendment jurisprudence.”¹⁵⁶ The *On Lee* defendant made four initial arguments in an attempt to raise the question left open in *Goldman*—whether the entry into an office to install

¹⁵¹ *Id.* at 780-81.

¹⁵² *Id.* at 781.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 773, 774 & n.6.

¹⁵⁵ *Id.* at 774.

¹⁵⁶ *Id.*

a listening device might constitute a trespass, with the operation of the device serving as a "continuing trespass."¹⁵⁷

The *On Lee* defendant's first losing argument was based on the proposition that "unlawful conduct" by the wired informant, after the defendant consented to his entry into the business premises, would constitute the tort of trespass *ab initio*.¹⁵⁸ Justice Jackson reasoned that even if the agent's conduct were assumed to be unlawful, the Court had ruled the trespass *ab initio* doctrine should not be extended beyond civil actions against the government to cases "where the right . . . to . . . use . . . evidence is involved."¹⁵⁹ The second losing argument was that the informant tortiously entered by fraud, as Justice Harlan noted.¹⁶⁰ Here Justice Jackson acknowledged the "orthodox tort law" was unclear as to whether an entry without any affirmative misrepresentation would be a trespass.¹⁶¹ But he concluded that any such "fine-spun" tort doctrine similarly deserved rejection as "a fiction whose origin, history, and purpose do not justify . . . [its] application," according to the same precedent that rejected the relevance of the trespass *ab initio* doctrine.¹⁶²

In his third losing argument, the *On Lee* defendant identified the government agent as a trespasser.¹⁶³ By sending the wired informant into the defendant's business premises, the agent gained the same access to their conversations that physical entry by the agent would have provided. Justice Jackson rejected this analogy as "frivolous" and then summarized the three types of trespassory entry that would allow the Court to reach the question left open in *Goldman*.¹⁶⁴ These included physical entry by force, physical entry by unwilling submission to authority, and physical entry without any express or implied

¹⁵⁷ *Goldman v. United States*, 316 U.S. 129, 134-35 (1942) (noting that this question was unnecessary to decide where agents made such an entry but the listening device did not work).

¹⁵⁸ *On Lee v. United States*, 343 U.S. 747, 751-52 (1952).

¹⁵⁹ *Id.* at 752 (quoting *McGuire v. United States*, 273 U.S. 95 (1927)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §18 (1971); *McGuire*, 273 U.S. at 95).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

consent.¹⁶⁵ The entry by the wired informant matched none of these methods. The defendant's fourth losing argument relied on an analogy between the conduct of the wired informant in *On Lee* and the informant in *Gouled* who entered an office not by force but "by subterfuge or fraud."¹⁶⁶ Justice Jackson dismissed the analogy because *Olmstead* limited *Gouled*'s doctrine to a scenario where tangible property is seized by an informant.¹⁶⁷ Therefore, *Gouled* was inapposite to cases involving the use of "mechanical or electronic devices" to intercept conversations, "at least where access to the listening post was not obtained by illegal methods."¹⁶⁸

Unexpected doctrinal drama arose in the *White* plurality opinion, thanks to the *On Lee* defendant's fifth argument—that *Olmstead* should be overruled.¹⁶⁹ After almost twenty years of judicial treatment as a "trespass" precedent, *On Lee*'s alternate identity was announced by the *White* plurality, without citation to the briefs or arguments of the parties, the arguments in the opinions below, the Court's own precedents, lower court opinions, or scholarly commentary. After acknowledging that the *On Lee* Court's trespass rationale "cannot survive *Katz*," the *White* plurality declared:

But the [*On Lee*] Court announced a second and independent ground for its decision; for it went on to say that overruling *Olmstead* and *Goldman* would be of no aid to *On Lee* since he "was talking confidentially and indiscreetly with one he trusted, and he was overheard It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the

¹⁶⁵ *Id.* at 752-53 (citing *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948); *Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940)).

¹⁶⁶ *On Lee*, 343 U.S. at 753.

¹⁶⁷ *Id.* at 753.

¹⁶⁸ *Id.* But cf. Maclin, *supra* note 11, at 190-93, 199-200 (providing critique of *On Lee* Court's analysis); Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 Wash. U. L.Q. 573, 598-603 (1996) (hereinafter Maclin, *Informants*) (same).

¹⁶⁹ *On Lee*, 343 U.S. at 753.

Fourth Amendment here.” [citing *On Lee*] We see no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case, nor are we now inclined to overturn this view of the Fourth Amendment.¹⁷⁰

Justice Harlan responded to this surprising doctrinal development by acknowledging that the *On Lee* opinion did draw “some support from a brief additional assertion that ‘eavesdropping . . . with the connivance of one of the parties’ raises no Fourth Amendment problem.”¹⁷¹ But Harlan insisted that it would be a “misreading” of *On Lee* to treat this “unelaborated assertion” as “a wholly independent ground for decision.”¹⁷² Without offering further arguments, Harlan maintained that, “at the very least, this rationale needs substantial buttressing if it is to persist in our constitutional jurisprudence” after the Court’s issuance of the many decisions that collectively cast doubt upon *On Lee*’s older “understanding of the Fourth Amendment.”¹⁷³ If Harlan had chosen to analyze the *White* plurality’s *On Lee* excerpt in its entirety, he could have pointed out that the ambiguity of the passage, from which the plurality quoted only selectively, created some doubt about the plurality’s interpretation of its significance.¹⁷⁴

¹⁷⁰ United States v. White, 401 U.S. 745, 750 (1971) (plurality opinion) (quoting *On Lee*, 343 U.S. 747, 753-54 (1952)).

¹⁷¹ *Id.* at 774 (Harlan, J., dissenting).

¹⁷² *Id.*

¹⁷³ *Id.* at 774-75 (noting that the *White* plurality opinion did not rest on the discovery of *On Lee*’s independent ground for decision, and instead provided additional reasoning for its holding, thereby “tacitly” recognizing “the analytic inability of this bare hypothesis [about the independent ground] to support a rule of law so profoundly important to the proper administration of justice”). Cf. *id.* at 746-54 (plurality opinion) (revealing that the analysis of *On Lee* constituted six percent of the word count in the plurality opinion, compared to eleven percent used for borrowed ideas from Justice White’s *Katz* concurrence, and eighty-three percent for other arguments and observations).

¹⁷⁴ The relevant passage in *On Lee* consisted of a series of comments that explained why the Court rejected the *On Lee* defendant’s fifth argument that *Olmstead* should be overruled. First, the Court noted that the *Goldman* defendant had failed to persuade the Court to reconsider *Olmstead*. Second, the Court pointed out that the *On Lee* defendant’s attempt to overturn *Olmstead* “would be of no aid [to him] unless he can show that his situation should be treated as wiretapping.” Third, the Court opined that the “presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping.” Fourth, the Court explained that judgment by noting that when

Justice Harlan did not modify his thesis concerning the decline of *On Lee*'s authority when confronted with the *White* plurality's challenge to *On Lee*'s formerly exclusive association with *Olmstead*'s "trespass rationale."¹⁷⁵ Presumably he recognized that Fourth Amendment privacy cases had been litigated for years, apparently without anyone noticing *On Lee*'s "independent ground for its decision."¹⁷⁶ Harlan was prepared to attack *On Lee*'s authority on two fronts, by producing evidence of the evisceration of its trespass rationale, and by challenging its governing assumptions and result as inconsistent with the *White* plurality's "understanding of the Fourth Amendment" as revealed in subsequent precedents.¹⁷⁷

2. Preservation of a Fossilized *On Lee* while Fourth Amendment Evolution Quickened

Harlan's discussion of the three newly emerging Fourth Amendment principles illustrated the ways in which the *On Lee* opinion had acquired two conspicuous flaws as it aged. First, the framework of older principles reflected in *On Lee*'s reasoning had been replaced with opposing principles, so that the *On Lee*

the agent receiving transmitted conversations overheard the defendant, this event had the same "effect on his privacy" as if the agent "had been eavesdropping outside an open window." Fifth, the Court noted that the equivalence between plain hearing and electronic hearing was analogous to the equivalence between plain sight and the permissible use of "bifocals, field glasses or the telescope." Finally, the Court summed up its conclusion that "eavesdropping," presumably nonelectronic overhearing, should not be likened to other intrusions that constitute a search or seizure. *On Lee*, 343 U.S. at 753-54. *But see id.* at 765, 766-67 (Burton, J., dissenting) (endorsing the opposite logic from Justice Jackson, because even though agents outside the premises may use hearing aids to pick up a conversation inside the premises "more distinctly," this rule should not justify treatment of a transmitting device on wired listener as merely a hearing aid; arguing that a transmitter was equivalent to the physical presence of a listening agent hidden illegally inside the premises). *See also* Geoffrey Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUND. RES. J. 1199, 1222 (viewing Justice Jackson's rejection of the defendant's fourth argument as a response to the dissents by Justices Frankfurter and Douglas in *On Lee*).

¹⁷⁵ *White*, 401 U.S. at 773 (Harlan, J., dissenting).

¹⁷⁶ *Id.* at 750 (plurality opinion).

¹⁷⁷ Compare *White*, 401 U.S. at 750 (plurality opinion) (describing *On Lee*'s "independent ground" as "an understanding of the Fourth Amendment") with *id.* at 769 (Harlan, J., dissenting) (referring to the Court's "perception of the scope and role of the Fourth Amendment since *On Lee* was decided").

Court's holding was both outdated and inconsistent with the framework that now provided the starting point for resolving the *White* issue. Second, *On Lee* had acquired a dossier of critical commentary in Supreme Court dissents and concurrences, and Court majorities had repeatedly refused to apply its holding and rationales as written. This treatment cast upon *On Lee* the status of an unusable precedent, whose citation in subsequent cases became, in Harlan's view, an empty gesture.¹⁷⁸ As a technical matter, *On Lee*'s result remained "on the books" while the pre-*Katz* cases foreshadowed the Court's readiness to extend the implicit rejections of *On Lee*'s premises to the explicit rejection of its result.¹⁷⁹

The earliest seeds of the three emerging Fourth Amendment principles could be found in the dissenting opinions in *On Lee*, *Goldman*, *Olmstead*, and in other early opinions.¹⁸⁰ When these principles emerged in the Court's majority opinions, they received validation together in the same cases, because each principle complemented and served to support the value of the other principles. For example, the *Silverman* Court emphasized the value of the "core" privacy right to retreat into the home, noted the absence of a technical trespass committed by the government's use of a "spike mike," and observed, "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."¹⁸¹

Harlan used both privacy cases and search cases to illustrate the Court's endorsements of the emerging principles, as

¹⁷⁸ See, e.g., *White*, 401 U.S. at 777, 780 (Harlan, J., dissenting) (referring to citations to *On Lee* in *Lopez* and *Berger*).

¹⁷⁹ See *supra* notes 9 & 39 (revealing how this readiness was erased with the appointment of Justice Blackmun in 1970, who provided the fourth vote for the *White* plurality opinion and the fifth vote for the rejection of protection for the privacy interest).

¹⁸⁰ See, e.g., *Goldman v. United States*, 316 U.S. 129, 136-41 (1942) (Murphy, J., dissenting) (focusing on the value of a right to privacy, on the arbitrariness of a physical invasion requirement, and on the need to protect revelations of private thoughts expressed in conversations); *id.* at 140 n.8 (noting how *Olmstead* departed from the approach of earlier decisions that "insisted on a liberal construction of the Fourth Amendment" (citing *Gouled v. United States*, 255 U.S. 298 (1921); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Boyd v. United States*, 116 U.S. 616 (1886)).

¹⁸¹ *Silverman v. United States*, 365 U.S. 505, 511-12 (1961).

evidenced by his reliance on cases like *Jones v. United States*¹⁸² and *Warden v. Hayden*.¹⁸³ The *Jones* Court emphasized that the subtle historical distinctions of private property law should not be imported into the law defining Fourth Amendment rights, and recognized that overnight guests should have standing to challenge dwelling searches.¹⁸⁴ *Hayden* similarly relied on the decades of doctrinal movement away from reliance on common-law property concepts as the governing definitions for privacy interests, and overturned the longstanding prohibition on the seizure of “mere evidence” in which the government could assert no property interest.¹⁸⁵

The *Lopez*, *Osborn*, and *Berger* decisions provided Harlan with his most direct evidence of the Court’s emerging dissatisfaction with *On Lee*’s rejection of the Fourth Amendment’s application to the government’s use of wired listeners. If the *Lopez* issue had been decided soon after *On Lee*’s ruling in 1952, that ruling should have supplied the controlling authority to uphold the use of a recording device by the government official who entered the *Lopez* defendant’s office. According to *On Lee*’s rationales, such an entry would be non-trespassory.¹⁸⁶ But Harlan’s *Lopez* opinion in 1963 did not invoke *On Lee* as the controlling authority in this way, and his *White* dissent pointed to the narrowness of his *Lopez* reasoning as an obvious sign of the Court’s retreat from both “the questionable rationale” and the result of *On Lee*.¹⁸⁷ Specifically, Harlan’s *Lopez* opinion emphasized a government official’s use of a recording device could be upheld because it was not a transmission device. The decision further

¹⁸² *Jones v. United States*, 362 U.S. 257 (1960).

¹⁸³ *Warden v. Hayden*, 387 U.S. 294 (1967).

¹⁸⁴ *Jones*, 362 U.S. at 266. *But cf.* *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (preserving right of overnight guest to challenge dwelling search, but rejecting *Jones* Court’s extension of standing to “anyone legitimately on the premises where a search occurs”).

¹⁸⁵ *See Hayden*, 387 U.S. at 304-10 (noting early example of the Court’s escape from “the bounds of common law property limitations in *Silverthorne*,” which recognized the need for a suppression remedy even when “no possible common law claim existed for the return of the copies made by the Government of the papers it had seized”). *See generally* Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 55-61 (2005) (analyzing the abolition of the “mere evidence” rule).

¹⁸⁶ *See supra* Part III.B.1. (discussing *On Lee* rationales).

¹⁸⁷ *United States v. White*, 401 U.S. 745, 768, 776 (1971) (Harlan, J., dissenting).

distinguished *On Lee* by noting that the invisible government agents in *Lopez* had not committed "electronic eavesdropping" by listening to the defendant's conversations.¹⁸⁸ This refusal to reaffirm the *On Lee* result was all the more remarkable because it was not a necessary consequence of the Court's endorsements of the emerging but more abstract general Fourth Amendment principles. Thus, *Lopez* marked the first clear turning point that foreshadowed the Court's readiness to reopen the *On Lee* decision, at the same time that four members of *Lopez* Court were ready to go further and overrule *On Lee*.¹⁸⁹

Both *Osborn* and *Berger* spoke directly to the Court's endorsement of the warrant system for the use of listeners with either recorders or wiretaps. In Harlan's view, the *Osborn* Court's approach effectively superceded the authority of *Lopez*, as the *Osborn* opinion "expressly abjured reliance on *Lopez*" and approved of the use of the recording informant based on the judicial approval of that use.¹⁹⁰ The reach of *Berger*'s reasoning went even further and "expunged any remnants of former doctrine" that were inconsistent with the Court's declaration "that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised 'bugging.'"¹⁹¹ This principle effectively buried the contradictory perspective of *Olmstead* and *On Lee*. Although *Berger*'s narrow holding addressed the elements required for valid wiretapping warrants, Harlan noted that the "emerging operative assumptions" of *Berger* rested on the commitment to judicial scrutiny of "electronic surveillance" devices generally because their current "indiscriminate use" by law enforcement posed a threat to liberty.¹⁹² As Harlan's assessments of *Lopez*, *Osborn*, and *Berger* made apparent, the question to be addressed in *White* was not whether *Katz* had "disturbed" *On Lee*, but whether *On Lee* had survived the pre-*Katz* privacy and search precedents of the 1960s.¹⁹³ Moreover, Harlan found further evidence

¹⁸⁸ *Id.* at 775.

¹⁸⁹ *Id.* at 776.

¹⁹⁰ *Id.* at 777-78.

¹⁹¹ *Id.* at 779.

¹⁹² *Id.* at 780, 778 n.12.

¹⁹³ *Id.* at 779.

of *On Lee*'s fossilization in the Court's support for judicial scrutiny, illustrated in post-*Katz* search precedents, of government intrusions that had been left unregulated in the *On Lee* era.

3. The Unforeseen New Era of the Primacy of the Warrant Principle

Harlan emphasized the need to consider the primacy of a fourth "general" Fourth Amendment principle in order to appreciate the outdated character of the presumptions underlying the *On Lee* decision.¹⁹⁴ He described this principle as a requirement that, "in order to be constitutionally permissible," any "official investigatory action that impinges on privacy must typically . . . be subjected to the warrant requirement."¹⁹⁵ As evidenced by the *Katz* litigation, the idea that the warrant requirement might be applied feasibly to electronic surveillance was still being "worked out" at the time of the *Osborn* and *Berger* decisions.¹⁹⁶ At the time of the *On Lee* decision, this idea would have been a radical one for the Court to accept because of the existence of several doctrinal obstacles. These obstacles helped to explain why the reasoning of the Court's opinions in *Olmstead*, *Goldman*, and *On Lee* did not discuss the option of requiring a traditional search warrant for the electronic surveillance methods at issue. Instead, the Court appeared to assume in this era that the recognition of a claimed privacy interest would result in the prohibition of the surveillance method.¹⁹⁷

The first obstacle was the doctrinal prohibition on using search warrants for the seizure of "mere evidence," which was established in *Gouled* and not abandoned until *Hayden*.¹⁹⁸ The seizable categories of evidence included contraband, criminal proceeds, and instrumentalities of crime. The evidence of con-

¹⁹⁴ *Id.* at 781.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 780.

¹⁹⁷ *Cf.* Sklansky, *supra* note 107, at 234 (noting that a "passing" comment in *Silverman* regarding the possibility of a warrant was a sign of a new era); *Goldman v. United States*, 316 U.S. 129, 136, 140 n.7 (1942) (Murphy, J., dissenting) (speculating that some type of "administrative supervision" of detectaphone could be established as a substitute for traditional search warrant process).

¹⁹⁸ *Warden v. Hayden*, 387 U.S. 294, 304-10 (1967).

versations did not fit any of those categories in a literal sense.¹⁹⁹ A second obstacle was the requirement for warrants to describe, with particularity, the things to be seized. Unlike tangible objects, conversations exist in the future, and their content, timing, and parties are not possible to describe with accuracy.²⁰⁰ In addition, an ordinary search warrant would be disclosed after execution, but disclosure of an ongoing warrant to intercept conversations would put an end to the secrecy of the surveillance.²⁰¹ In 1967, after the "mere evidence" rule was abolished in *Hayden*, the *Berger* decision established the template for a warrant system for wiretapping.²⁰² Shortly thereafter, *Katz* affirmed the feasibility of applying the warrant system to the use of the recording device on the telephone booth.²⁰³

Thus, one fossilized aspect of the framework for the *On Lee* decision was the "all-or-nothing" framework of options that informed its 1952 holding and rationales, which were embedded in the assumptions of the era of the "mere evidence" rule.²⁰⁴ *On Lee* arguably could not serve as meaningful authority for the contested issue in *White* concerning the imposition of the warrant requirement on wired listeners. The *On Lee* Court rejected a privacy claim during an era when acceptance of the claim would have required the government to stop using wires, not merely to get warrants for wires. Even before *On Lee*'s trespass rationales eroded, *On Lee* could have been regarded as being inapposite from the start as useful authority for *White*.

Harlan's concern with the "primacy" of the warrant principle was a different one, however, and his evidence for the

¹⁹⁹ Sklansky, *supra* note 107, at 235.

²⁰⁰ See *id.* at 236 & n.64 (describing the view that warrants for the interception of conversation would not satisfy the particularity requirement and would constitute unreasonable "general warrants").

²⁰¹ *Id.* at 236.

²⁰² *Hayden*, 387 U.S. at 307.

²⁰³ *Katz v. United States*, 389 U.S. 347, 354-55 (1967).

²⁰⁴ Compare *United States v. Johnson*, 333 U.S. 10, 13-14 (1948) (providing Justice Jackson's famous description of the warrant requirement as an essential protection for "a society which chooses to dwell in reasonable security and freedom from surveillance" (quoted in *United States v. White*, 401 U.S. 745, 768, 781 n.17 (1971) (Harlan, J., dissenting)) with *On Lee v. United States*, 343 U.S. 747, 758 (1952) (revealing no comment by Justice Jackson concerning the feasibility of imposing the warrant system on the use of wired listeners).

emerging primacy of that principle did not stop with *Silverman*, *Osborn*, *Berger*, and *Katz*.²⁰⁵ He also relied on the search cases of *Camara v. Municipal Court*,²⁰⁶ *Chimel v. California*,²⁰⁷ and *Terry v. Ohio*,²⁰⁸ to show how the justifications for warrants for wired listeners in *White* were supported by the expansion of Fourth Amendment protection in each of these precedents. In *Camara* and *Chimel*, government searches that were previously unregulated by the warrant requirement were brought under its mandate, and for similar reasons. The *Camara* Court required warrants for housing inspections, but demonstrated flexibility by approving a warrant based on area-wide need for inspections, rather than evidence of need for inspecting particular houses.²⁰⁹ The *Chimel* Court's ruling effectively required search warrants for houses that previously could be searched from top to bottom when an arrest occurred inside.²¹⁰ Both precedents recognized that judicial pre-authorization provided desirable protection against arbitrary police intrusions and "hunting expedition[s]" for evidence.²¹¹ These precedents supplied evidence of the Court's support for case-by-case scrutiny of government justifications for privacy intrusions, and *Terry*'s stop-and-frisk rules demonstrated a commitment to that principle, even in the absence of a warrant requirement.²¹² As Harlan's analysis intimated, from the perspective of the *On Lee* Court, each of these three decisions would have been inconceivable applications of the warrant principle in 1952, highlighting a further dimension of *On Lee*'s fossilization and providing a further reason to abandon its holding.

²⁰⁵ *White*, 401 U.S. at 781 (Harlan, J., dissenting).

²⁰⁶ 387 U.S. 523 (1967).

²⁰⁷ 395 U.S. 752 (1969).

²⁰⁸ 392 U.S. 1 (1968). *Cf. White*, 401 U.S. at 784 (Harlan, J., dissenting) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969)).

²⁰⁹ *White*, 401 U.S. at 778, 781-82 (Harlan, J., dissenting).

²¹⁰ See *Chimel*, 395 U.S. at 768-69 (overruling *United States v. Rabinowitz*, 339 U.S. 56 (1950)).

²¹¹ *White*, 401 U.S. at 783.

²¹² See Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1094 (1982) (describing *Terry*'s imitation of the warrant system's protections, in the form of a scope limitation principle that imposed the burden on the government to justify each step in the escalation of an initial intrusion on a case-by-case basis).

C. Harlan's Formulations of the "Should" Question About Risks and Expectations

1. The Task of the Law: To Form and Project the Future, to Mirror and Reflect the Past

The decision to impose the warrant system for the use of wired listeners would have been consistent with virtually every result and rationale of all the precedents that Harlan so painstakingly marshaled, examined, explained, and interpreted in the light of their subsequent treatment in later precedent. But Harlan preferred to speak as though in a dialogue with the *White* plurality, and to begin by offering this sentiment as their own: "That the foundations of *On Lee* have been destroyed does not, of course, mean that its result can no longer stand."²¹³ Then he responded by offering his reasons that the *On Lee* result "should not stand," because of the lack of "substantial buttressing" needed for it "to persist in our constitutional jurisprudence."²¹⁴

Harlan continued the dialogue by noting the narrowness of the precedents of *Hoffa*, *Lewis*, and *Lopez*, which the plurality had "fasten[ed] upon" to "resist the undercurrents of the more recent cases" that imposed the warrant requirement on forms of electronic surveillance as well as other intrusions.²¹⁵ None of the plurality's three precedents involved the "surreptitious third ear" of the government agent who receives a transmission from the wired listener.²¹⁶ For that reason, Harlan concluded that the plurality's effort to "buttress" *On Lee* could be reduced to a single argument based on two assumptions. Implicitly, the *White* plurality first assumed that "the distinction between third-party monitoring and *other* undercover techniques" is "one of form and not substance."²¹⁷ Accordingly, the plurality then assumed that

²¹³ *White*, 401 U.S. at 784.

²¹⁴ *Id.* at 775.

²¹⁵ *Id.* at 784.

²¹⁶ *Id.*

²¹⁷ *Id.* at 785.

the electronic monitoring in *White* involved the same invasion of privacy as other uses of unwired listeners.²¹⁸

Harlan recognized that the plurality opinion used the *Katz* vocabulary of “expectations” interchangeably with the vocabulary of “risks,” plugging these words into similar comments about the risks undertaken by “wrongdoers” and about their “expectations.”²¹⁹ For example, the *White* plurality declared that since a wrongdoer “necessarily risks” the “trustworthiness” of any confidante who may be an informant, it may be concluded that neither a wired nor unwired informant will invade the wrongdoer’s “justifiable expectations of privacy.”²²⁰ Justice White passed quickly over the question whether “defendants” have actual (subjective) expectations of privacy, because that was not the Court’s “problem.”²²¹ Instead, as he explained, “Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally ‘justifiable.’”²²² Asked another way, “[W]hat expectations [will] the Fourth Amendment . . . protect in the absence of a warrant?”²²³ For Justice White, the answer was provided by logic: “[T]he law permits the frustration of actual expectations” by the use of non-electronic reporting informants in *Hoffa* and *Lewis*, and so the same “frustration of expectations” must be justifiable under the law for those monitored by wired informants.²²⁴

Rather than criticize Justice White directly for resting the plurality’s decision on these assumptions, Harlan observed neutrally that “the ‘so-called risk analysis’ approach of *Lewis*” and *Hoffa*, and the “expectations approach” of *Katz*, “have their limitations and can ultimately lead to the substitution of words for analysis.”²²⁵ Harlan then seized the gift that the plurality’s reasoning provided for him—the opportunity to call attention to the

²¹⁸ *Id.*

²¹⁹ *Id.* at 789.

²²⁰ *Id.* at 751-52 (plurality opinion).

²²¹ *Id.* at 751.

²²² *Id.* at 752.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 786 (Harlan, J., dissenting) (noting that the “risk” and “expectations” approaches are formulations that “represent an advance over the unsophisticated trespass analysis of the common law”).

responsibility of judges for articulating and explaining the potential meanings of "expectations" and "risks." Harlan explained that the analysis of "expectations" or "risks" always raised a "should" question, concerning "the desirability" of recognizing particular expectations, or conversely, of "saddling" particular risks "upon society."²²⁶ Harlan did not want judges to "merely recite the expectations and risks" that only reflect the "laws that translate" customs and values into rules.²²⁷ He declared that "the task of the law" is to "form and project" the customs and values of the future, as well as to "mirror and reflect" the "customs and values of the past and present."²²⁸

In speaking of the recitation of risks, Harlan might have been referring to the unhelpful legacies of *Olmstead*, *Goldman*, and *On Lee*, whose rationales directed judges to the past, rather than enabling them to build Fourth Amendment foundations for the future of the electronic age. Harlan's talk of the competing tasks of the law, to be focused on the future as well as on the past, reflected his understanding of the historically contested character of the judicial portrayal of the customs and values at stake in electronic surveillance controversies. For judges who asked the "should" question, Harlan's analysis of the privacy precedents revealed that the Court's holdings had not remained static, and implied the they would change in the future.²²⁹ The *White* plurality's attempt to resurrect *On Lee* symbolized a philosophy that was the opposite of Harlan's perspective. He wanted judges to avoid the recitation of past conclusions con-

²²⁶ *Id.*

²²⁷ *Id.* Cf. Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 BUFF. L. REV. 333, 363 & n.145 (1984) (recognizing that Harlan's approach to determining expectations of privacy is "prospective in nature," asking whether, "under our system of [representative democracy]," it will be "desirable to live in a society in which the expectations of privacy in question are not protected . . . against unreviewable governmental action") (referring to *White*, 401 U.S. at 786 (Harlan, J., dissenting)).

²²⁸ *White*, 401 U.S. at 786 (opining that Fourth Amendment analysis must "transcend the search for subjective expectations or legal attribution of assumptions of risk"). See Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 959 (2008) (recognizing Harlan's concern with the jurisprudence of "the social" in his search for "transcendence" analysis).

²²⁹ See *supra* text accompanying notes 40, 180 (noting dissents in *Olmstead*, *Goldman*, *On Lee*, and *Lopez*).

cerning expectations and risks by remembering the need to open the intellectual doors to re-examining those conclusions. In Harlan's hands, the implementation of the "task of the law" called for the independent scrutiny of each new privacy problem, not for reliance on analogies to outdated privacy doctrines.

2. Harlan's Standard: Assessing the Impact of Surveillance on the Ordinary Citizen

In addressing the "should" question about the risks and expectations involved in *White*, Harlan explained that "[t]his question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security," since that sense "is the paramount concern of Fourth Amendment liberties."²³⁰ Here the "individual" represented everyone, including the "public generally," and more particularly, the "ordinary citizen" who "has never engaged in illegal conduct in his life."²³¹ Harlan assumed that government officials possess neither the foresight nor the good fortune to commence investigations only against individuals who may be convicted of crimes, or "wrongdoers" who may be "contemplating illegal activities."²³² Therefore, the agents who manage informants and equip them with wires cannot be expected to avoid the monitoring of "ordinary citizens."

Harlan could not imagine why courts should assume that the presence of wired informants and agents in our midst would have no impact on our lives. He saw that impact as the Fourth Amendment's concern, because it impairs "that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society."²³³ Given the function of the warrant system as the constitutional method of providing judicial protection to that sense of security, Harlan articulated the "should" question in *White* as follows: "[W]hether, under our system of government, as reflect-

²³⁰ *White*, 401 U.S. at 786 (Harlan, J., dissenting).

²³¹ *Id.* at 789-90.

²³² *Id.* at 749-53 (plurality opinion) (repeating references to "wrongdoers" or "defendants").

²³³ *Id.* at 787 (Harlan, J., dissenting).

ed in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.”²³⁴

Although Justice White did not formulate a “should” question in the plurality opinion, a suitable question to fit that opinion could have been phrased as follows: Whether we should impose on “wrongdoer[s]” or on those “contemplating illegal activities” the risk of the electronic listener, on the grounds that this risk is similar to that already imposed by the Court’s precedents on such persons, namely the risk that the listener will report back to government officials without the aid of electronic surveillance.²³⁵ A further refinement of that question could be accomplished by adding this question: Whether we should deem these two risks to be similar in the absence of “persuasive evidence” produced by the defendant that the utterances of “wrongdoers” would be “substantially different” or their sense of security any less if they thought it possible that the listener might be wired with an electronic surveillance device.²³⁶

A comparison of Harlan’s question with these questions illustrates how the scope of the plurality’s inquiries differed in several ways. First, the plurality justices saw no reason to conduct an “impact analysis” concerning the potential effects of surveillance by wired agents and informants on ordinary citizens. Second, they viewed the government’s power to use surveillance tools, without judicial scrutiny, as a need that should be accommodated when the “risks” to “wrongdoers” could be viewed as sufficiently similar.²³⁷ Third, they placed the burden of disproving the similarity of these risks on the defendant in

²³⁴ *Id.* at 786.

²³⁵ *Id.* at 751-52 (plurality opinion) (repeating analogies between disclosures by trusted accomplices under all surveillance circumstances).

²³⁶ *Id.* at 752-53 (declaring that “there is no persuasive evidence” that this difference “is substantial enough to require discrete constitutional recognition”). *But cf.* Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 159 (2002) (noting that the *White* plurality equated first treated “a willingness to trust people” as “an invitation to deception” by disclosing informants, and second, treated “the further sharing of the [electronic] fruits of that pretense” with government agents as “no more intrusive than the initial deception”).

²³⁷ *Id.* at 752-53 (plurality opinion). *Cf.* Brief for the United States, *supra* note 7, at 33 (describing the government’s “right” to use a listening device on an informant).

White. Finally, they defined the burden implicitly to require the production of empirical evidence that would be difficult, if not impossible, to produce.²³⁸

These questions of the *White* plurality justices produced a simple inquiry because so many other questions were avoided. The questions were designed to be answered, “No.” In the absence of the aforementioned evidence, the risks of disclosure from reporting and from electronic surveillance were deemed to be similar for wrongdoers. A third and final question of the plurality could be phrased as follows: Whether any evidentiary barrier should be erected to the admission of transmitted conversations obtained by wired listeners, given the “accurate,” “reliable,” “relevant,” and “probative” nature of such evidence.²³⁹ Again, the answer would be, “No.” The plurality described the defendant’s claim for recognition of a privacy interest as a demand for “a Fourth Amendment privilege” against the admission in evidence of “a more accurate version” of a conversation than could be obtained from an unwired informant.²⁴⁰

Justice Harlan’s dissent posed questions that held no interest for the plurality. First, in undertaking an inquiry into the “impact of the practice of third-party bugging,” Harlan observed that the impact of wired agents and informants constituted an “extensive” type of intrusion that would “significantly jeopardize” the sense of security of citizens in a free society.²⁴¹ Second, Harlan made it clear that his inquiry required the exercise of

²³⁸ *White*, 401 U.S. at 752 (plurality opinion) (observing that “it is only speculation to assert that the defendant’s utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound”).

²³⁹ *Id.* at 753. Cf. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 575-77 (2007) (arguing in favor of *White* rule and similar rules). But cf. Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 137 (2002) (observing that the *White* plurality’s consideration of the state’s need for the evidence supplied by wired listeners would have been more appropriately addressed “under the [Fourth] Amendment’s [reasonableness analysis] balancing rubric,” rather than being used to determine whether to recognize the privacy interest).

²⁴⁰ *White*, 401 U.S. at 753. See *infra* text accompanying note 283.

²⁴¹ *Id.* at 786-87 (Harlan, J., dissenting). Cf. Stone, *supra* note 174, at 1219 (describing the importance of assessing the impact of a surveillance practice “on the lives of individuals and on the nature of society”).

imagination as to the possible impact arising from unregulated “bugging.” He was concerned about the future possible impact that might be imagined if the uses of such surveillance were to become a “prevalent practice.”²⁴² Third, he did not demand empirical proof of present impact, although he might have regarded such evidence as helpful. Instead, he was prepared to take judicial notice of the potential impact of wired listeners and observers, in formulating a basis for discerning cultural intuitions about the nature of that impact.²⁴³ In Harlan’s view, “[a]uthority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed.”²⁴⁴ Harlan went on to describe how the impact of wired listeners would be both personal and political, with the potential to inhibit “much vital social exchange,”²⁴⁵ and to “smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.”²⁴⁶

Harlan was attuned to the potential consequences of the government’s gathering of “speech” evidence, and to the impossibility of separating the sense of security about freedom of speech as a daily and lived expectation, from the sense of security about the surreptitious discussion of criminal activities. He was the Court’s architect of the doctrines that led to enduring restrictions of the government’s power to prosecute the advocacy

²⁴² *Id.* at 787 (Harlan, J., dissenting).

²⁴³ When Harlan called for “assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security,” he ended this statement with “balanced against the utility of the conduct as a technique of law enforcement.” *Id.* at 786. However, he did not engage in such “balancing” in *White* or even identify specific aspects of the “utility” of the conduct. Given the difficulty of comparing incommensurable values such as impact and utility, scholars have criticized the latter element without mentioning that Harlan never described or applied it in his *White* dissent. See, e.g., William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 44 n.161 (2001/2002).

²⁴⁴ *White*, 401 U.S. at 787 (Harlan, J., dissenting).

²⁴⁵ *Id.* at 788 n.23.

²⁴⁶ *Id.* at 787. See also Doernberg, *supra* note 41, at 284-85 (criticizing the *White* plurality’s demand for empirical proof of inhibiting effect of wired listeners, and observing that evidence rules provide for privileges based on the presumption that requiring disclosures would have inhibiting effects on a variety of behaviors).

of illegal action.²⁴⁷ Moreover, only two months after the *White* decision, Harlan authored the Court's opinion in *Cohen v. California*,²⁴⁸ and his advocacy of Fourth Amendment protection in *White* for "frivolous, impetuous, sacrilegious and defiant discourse" echoed his reasoning in support of First Amendment protection for the vulgar, the profane, and the immoral speech that cannot be punished without the danger of thought control.²⁴⁹

In his impact analysis, Harlan treated the government's practice of "third party bugging" as tantamount to a form of overbroad speech regulation. Members of society would have reason to fear potential future intrusions and exposures, and would remain vulnerable to exposure of past intrusions. Such records might appear at any time and embarrass, stigmatize, or damage a person, with or without provoking potential criminal prosecution.²⁵⁰ Each type of fear could produce a chilling effect on speech.

The first sense of fear invoked by Harlan was that which comes from the envisioned "instantaneous intrusion" of the invisible third ear, the government agent who receives the trans-

²⁴⁷ See *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 203 (1961). Cf. YARBROUGH, *supra* note 4, at 190-197 (reviewing these Harlan opinions for the Court, which led the government to abandon Smith Act prosecutions).

²⁴⁸ 403 U.S. 15 (1971) (enlarging First Amendment protection for offensive speech by reversing a disorderly conduct conviction for wearing a jacket displaying expletive in message). Cf. *Street v. New York*, 394 U.S. 576 (1969); Thomas B. Stoel, Jr., in REMEMBRANCES, *supra* note 15, at 165 (noting that Harlan's original majority draft in *Street* concluded that the First Amendment protected flag burning, but when the majority "melted away, and it looked as though the Court would hold that flag burning wasn't constitutionally protected," Harlan revised his opinion to reverse the conviction on narrower grounds and held on to the majority).

²⁴⁹ Cf. Dorsen, *supra* note 5, at 1419-20 (quoting *Cohen*'s principles and noting their importance for First Amendment doctrine); Taslitz, *supra* note 239, at 136-37 (noting that the *White* plurality ignored "[t]he broader impact of its rule on political dissenters, . . . unpopular minority groups, and the wider citizenry"); Karen A. Springer, *In God We Trust; All Others Who Enter This Store Are Subject to Surveillance*, 48 FED. COMM. L.J. 187, 203 (1995) (observing that Harlan's *White* dissent sought to protect the discourse of "informal conversation between intimates" which contains "agreeable falsehoods, exaggerations, obscenities, and even antisocial views that the speaker does not expect to be taken seriously").

²⁵⁰ Springer, *supra* note 249, at 203 (recognizing that disclosure of conversations may "lead to adverse consequences such as the loss of respect, or a job, or friends").

mitted conversations from the wired listener and who thereby becomes empowered to engage in "prying" into the speaker's "private affairs."²⁵¹ The second sense of fear was that which comes from the agent's power to preserve those conversations with a recording that "insures full and accurate disclosure of all that is said, free of the possibility of error and oversight."²⁵² This fear may be heightened by the realization that it is easy for the recording agents or anyone else who becomes privy to the recording to interpret speech in damaging ways. Disclosures could lead to the loss of relationships, of jobs, and of reputation, even when no criminal activity might be disclosed. That second sense of fear, as Harlan portrayed it, would be fueled by the realization that a person's recorded speech may carry erroneous connotations "when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation."²⁵³

Harlan objected to the implicit "should" questions posed by the *White* plurality justices, because they failed to consider the impact of wired listeners on ordinary citizens. He also objected to their failure to recognize that the consequence of Fourth Amendment protection from wired listeners would be the interposition of the warrant system upon government officials seeking to use wires, not the prohibition of this surveillance technique.²⁵⁴ Together, these two failures prevented the plurality from recognizing that the warrant requirement was all about "risks" because, in Harlan's view, its "very purpose" was to "redistribute the privacy risks throughout society in a way that produce[d] the results the plurality opinion ascribe[d] to the *On Lee* rule."²⁵⁵ That is, assuming that the plurality's goal was to impose the risk of transmission by informants upon "wrongdoers," the warrant requirement would achieve this result by approving of the use of wired listeners upon this class of non-

²⁵¹ *White*, 401 U.S. at 789 (Harlan, J., dissenting).

²⁵² *Id.* at 787.

²⁵³ *Id.* at 790. Cf. Taslitz, *supra* note 239, at 138 (observing that "the gravest danger is that of having one's character misjudged by being taken out of context").

²⁵⁴ *White*, 401 U.S. at 789-90 (Harlan, J., dissenting).

²⁵⁵ *Id.* at 789.

ordinary citizens, who could be identified by probable cause evidence of their criminal activities.

Harlan's focus on the warrant requirement provided a reminder that the *White* plurality's analysis of the benefits of wired listeners never explained how the scope of such benefits would be weakened by the probable cause and warrant requirements. The plurality also failed to explain its deference to the government need for the benefits of unregulated wired listeners. This need was presumed to be so strong that it could not be satisfied with the benefits from warrant-authorized wired listeners. That presumption effectively trumped the primacy of the Fourth Amendment warrant principle. The *White* plurality did not address the possibility that government agents would fail to exercise what Harlan called "self-restraint," by engaging in the use of wired listeners in cases in which no suspicion of criminal conduct existed to justify the investigation of their targets.²⁵⁶

For Harlan, the plurality's unstated presumption struck at the core of the Fourth Amendment's protection for "the openness which is at the core of our traditions," provided by placing limitations "on the means and circumstances by which the Government may collect information about its citizens by intruding into their personal lives."²⁵⁷ Harlan saw that the *White* plurality's holding, writ large, was based on the assumption that "uncontrolled" electronic surveillance "is a tolerable technique of law enforcement, given the values and goals of our political system."²⁵⁸ For Harlan, this assumption begged the question: Who should bear "the burden of guarding privacy in a free society"—the Government or its citizens? Ultimately, he saw the Fourth Amendment as standing for the proposition that "the Government . . . must justify its need to electronically eavesdrop."²⁵⁹

²⁵⁶ *Id.* Cf. Maclin, *Informants*, *supra* note 168, at 625 (noting that the *White* plurality "never addressed the reality that secret police informants would target, just as wire-tapping had targeted, the privacy and security of all citizens, the guilty and innocent alike").

²⁵⁷ *White*, 401 U.S. at 792 (Harlan, J., dissenting).

²⁵⁸ *Id.* at 785.

²⁵⁹ *Id.* at 793.

III. REFLECTIONS ON HARLAN'S UNDERSTANDINGS OF FOURTH AMENDMENT PRIVACY AS FREEDOM

A. Harlan's Views After *Katz* and Before *White* About Expectations of Privacy

It is ironic that a justice like Harlan, with his commitment to careful articulation of the reasoning for his decisions through the synthesis of nuanced interpretations of vast quantities of judicial prose, would receive not only Fourth Amendment fame but also intense scrutiny and criticism of his ideas, based on the twenty-seven words in his *Katz* concurrence about "expectations of privacy."²⁶⁰ Harlan's dissent in *White*, with its cautionary observation that "the expectations approach" can "lead to the substitution of words for analysis,"²⁶¹ has been interpreted as an expression of his "second thoughts" about his quotable and iconic formula in *Katz*.²⁶² The truth appears to be more complicated, and it is useful to consider how Harlan interpreted the expectations concept in his opinions appearing after *Katz* and before *White*.

In his opinion in *Alderman v. United States*,²⁶³ Justice Harlan interpreted the *Katz* rationale as providing Fourth Amendment "right to conversational privacy"²⁶⁴ for "every person who participates in a conversation he legitimately expects will remain private,"²⁶⁵ and for every person who "is not actually speaking" but "is listening to the confidences of others."²⁶⁶ To

²⁶⁰ See, e.g., *Simon*, *supra* note 228, at 947-49, 952-54; CLANCY, *supra* note 107, at 68 & n.139 (citing examples of criticism of the Court's use of the "expectations" formula). Cf. Doernberg, *supra* note 41, at 268 n.83 (citing thirty-five cases during the thirty-eight years since the *Katz* decision in which the Court has attempted "to deal with" the expectations standard).

²⁶¹ *White*, 401 U.S. at 786 (Harlan, J., dissenting).

²⁶² See, e.g., Heffernan, *supra* note 243, at 44 n.161 (observing that Harlan's *White* dissent shows that he came to have doubts about the expectations test); Stone, *supra* note 174, at 1213 n.70 (describing Harlan as having "second thoughts" in *White* about the expectations test); Amsterdam, *supra* note 15, 384 & n.345 (same).

²⁶³ *Alderman v. United States*, 394 U.S. 165, 187 (1969) (Harlan, J., concurring in part and dissenting in part).

²⁶⁴ *Id.* at 194.

²⁶⁵ *Id.* at 191.

²⁶⁶ *Id.* at 191 n.4.

these individuals, Harlan would have granted standing to object to the admissibility of electronically-seized conversations. He was willing also to consider an extension of standing "to protect a person's interest in his family's privacy . . . whenever a family member's reasonable expectation of privacy has been infringed," and "regardless of the place where his privacy was invaded."²⁶⁷ In "the field of conversational privacy," these conclusions illustrated the meaning of the *Katz* adage that "the Fourth Amendment protects persons not places."²⁶⁸ But Harlan was unwilling to preserve the pre-*Katz* rule that granted standing to a property owner to object to the admissibility of all conversations occurring on the owner's premises, irrespective of whether the owner participated in the conversations or was present at the time they were intercepted.²⁶⁹ Harlan argued that this pre-*Katz* rule mistakenly treated "the right to conversational privacy"²⁷⁰ as a property right, and thereby gave *Olmstead* "new life in the law of standing."²⁷¹

Thus, Harlan used the expectations concept in *Alderman* to explain why the personal and direct experience of the disturbance of conversational privacy should define the scope of the right to such privacy. He refused to equate the relationship between a property owner and a dwelling with the protected relationship between a speaker or listener and the speaker's intangible conversation. Harlan acknowledged the longstanding right of an absent property owner to challenge an illegal dwelling entry, and to object to the admission of the tangible effects seized as fruits from that dwelling.²⁷² But he rejected the right of a property owner to object to an illegal dwelling entry that produced only the "fruits" of intercepted, intangible conversations of people to whom the property owner had no family-based rela-

²⁶⁷ *Id.* at 194 (noting that this question need not be reached on the facts of *Alderman*).

²⁶⁸ *Id.* at 193.

²⁶⁹ *Id.* at 190-93. *Cf. id.* at 176 (majority opinion) (noting that the government conceded the continuing validity of the rule after *Katz*).

²⁷⁰ *Id.* at 194 (Harlan, J., concurring in part and dissenting in part).

²⁷¹ *Id.* at 191. *Cf. id.* at 178 (majority opinion).

²⁷² *Id.* at 189-91 (Harlan, J., concurring in part and dissenting in part).

tionship.²⁷³ Justice White's opinion for the *Alderman* Court concluded that nothing in *Katz* "was intended to withdraw any of the protection . . . extend[ed] to the home" in prior precedents.²⁷⁴ Therefore, the standing right of the property owner must be maintained based on *Silverman*'s holding, which "vindicated . . . the right to be secure in one's own home" at a time when "no right of conversational privacy had been recognized as such."²⁷⁵ But for Justice Harlan, expectations of privacy in the conversations of others could not be justified by reference to space alone.

The privacy problem in *Mancusi v. DeForte*²⁷⁶ presented Justice Harlan, speaking for the Court, with the opportunity to consider the role of the expectations concept in a context that did not involve the right of conversational privacy. After state officials entered a union office and seized the union's papers from the custody and over the protest of DeForte, a union official, the union did not protest the seizure. Instead, it was DeForte who was prosecuted and sought to obtain standing to object to the admission of the papers at his trial.²⁷⁷ As Harlan explained, DeForte had "little expectation of absolute privacy" in the papers,²⁷⁸ which were taken from him in a large room that he shared with several other union officials, and in which he spent "a considerable amount of time."²⁷⁹ The record did not reveal the precise location of the papers in the room at the time of seizure, and Harlan noted that if DeForte "had occupied a 'private' office," the Court's precedents would have established his standing to object to the seizure of papers from his desk or filing cabinet in that office.²⁸⁰ The reasonable expectations of an employee in a private office setting provided Harlan with the start-

²⁷³ *Id.* at 189-94.

²⁷⁴ *Id.* at 180 (majority opinion).

²⁷⁵ *Id.* at 178.

²⁷⁶ 392 U.S. 364 (1968). *Cf.* *Simmons v. United States*, 390 U.S. 377 (1968) (holding in another Harlan opinion, not involving discussion of expectations of privacy, that defendant's testimony offered to prove standing to seek suppression of evidence should be inadmissible in order to avoid deterring individuals from asserting Fourth Amendment rights).

²⁷⁷ *Mancusi*, 392 U.S. at 365.

²⁷⁸ *Id.* at 370.

²⁷⁹ *Id.* at 368-69 (citation omitted).

²⁸⁰ *Id.* at 369 (citations omitted).

ing point for determining the analogous expectations of an employee like DeForte in a shared office space.

Drawing implicitly upon the social norms of courtesy and business practice, Harlan determined that workers in a private office or a shared office would be similarly situated in terms of expectations. They would not be “disturbed” by anyone other than co-workers or their “personal or business guests,” and no papers in the offices would be touched “except with their permission or that of union higher-ups.”²⁸¹ Both of these expectations would be “defeated” by the warrantless entry of the state officials into DeForte’s work space and their seizure of the papers, and therefore DeForte should have standing to challenge this violation of his Fourth Amendment right.²⁸² Harlan saw no need to inquire into the question whether DeForte possessed a legal right to exclude members of the public from the shared office. In this way, the *Mancusi* decision resembled *Katz*, where the Court ignored the government’s argument that *Katz* could have no privacy interest in a telephone booth without a legal right to stop anyone from entering it.²⁸³ Nor did the *Mancusi* Court pause to consider whether the risk of the seizure of the papers by the state officials might have been assumed by DeForte, given the potential exposure of the union’s papers to other co-workers or non-invitees.²⁸⁴ Instead, Justice Harlan’s opinion treated an employee’s lack of “absolute privacy” as irrelevant, reflecting the assumption that Justice Marshall would later articulate, that “[p]rivacy is not a discrete commodity, possessed absolutely or not at all.”²⁸⁵

Justice Harlan’s *Mancusi* opinion reflected the merger of the “constitutionally protected area” concept with the “expectations of privacy” idea to raise the question whether the shared

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ See *supra* note 136 and accompanying text.

²⁸⁴ Cf. *California v. Greenwood*, 486 U.S. 35, 40 (1988) (rejecting privacy interest in garbage bag left for pickup outside dwelling because of possibility of access of public, including snoops and scavengers, and because of “conveyance” to third-party garbage collector).

²⁸⁵ *Smith v. Maryland*, 442 U.S. 735, 748, 749 (1979) (Marshall, J., dissenting). See Doernberg, *supra* note 41, at 299 (noting that Harlan’s *Mancusi* opinion recognized “relative privacy” in the shared workplace).

office was an area "in which there was a reasonable expectation of freedom from governmental intrusion."²⁸⁶ Harlan also merged this concept and this idea in his *Katz* concurrence, which included the reference to temporarily private places in which people may have momentary "expectations of freedom from intrusion."²⁸⁷ He used an analogy in *Mancusi* between workers with private offices and those with shared workspaces, like his analogy between the taxi cab and the telephone booth in *Katz*, in order to anchor the newly recognized privacy interest to the seabed of precedent. However, Harlan's analysis of the nature of the office "area" in *Mancusi* was more complex than the comments in his *Katz* opinion about the fleeting experience of making a call from a telephone booth.²⁸⁸ For example, his validation of equal expectations of privacy for workers who must share a single room, as well as the furniture and equipment inside it, ran counter to the typical "distributive tilt" of workplace privacy, expressed in the dichotomy between the warrant system protection for "private offices" and the power of police officers to search other types of offices with the consent of an employer.²⁸⁹

Moreover, Harlan's assessment of workplace expectations included subtle references to the emotional character of the privacy protection that a warrant would afford the workers in shared offices whose standing received recognition in *Mancusi*. The invisible recording surveillance in *Katz* went unnoticed by the defendant, and his protected expectation concerned his freedom from later discovery of the hidden intrusion and its consequences. But as Harlan noted, the intrusion in *Mancusi* coincided with the immediate workplace experience of being "dis-

²⁸⁶ *Mancusi*, 392 U.S. at 368.

²⁸⁷ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁸⁸ *Id.* (quoting from the *Katz* majority opinion concerning the behavior and assumptions of a person using a telephone booth).

²⁸⁹ William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270-71 (1999) (explaining the "distributive tilt" and noting that when people share their workspaces, police may look in spaces to which the public has access, and may look in other non-public spaces only with the consent of the employer). Cf. CLANCY, *supra* note 107, at 86-87 (describing Harlan's *Mancusi* opinion as "one of the most expansive readings of the scope of a person's right to privacy" and explaining how later cases reflect a more limited view of workplace privacy, such as *O'Connor v. Ortega*, 480 U.S. 709 (1987)).

turbed" in an enclave where only co-workers abided, by the entry of unauthorized persons demanding possession of documents whose relinquishment could cause negative consequences for the workers.²⁹⁰ By contrast, Justice Black's dissent in *Mancusi* argued that such experiences could create "no personal injury" or "invasion of the 'personal privacy' or security" of workers, whose status as mere "agents" of the entity gave them no cognizable Fourth Amendment expectations of any kind.²⁹¹ Justice White's dissent observed that even if the Fourth Amendment "perhaps" might protect an individual's private desk in an office space shared with others, the Court should not extend the protected area "to the office door."²⁹²

For similar reasons, Justice Harlan disagreed with the *Mancusi* dissents, the *Alderman* Court, and the *White* plurality. These opinions reflected the view that the *Katz* expectations concept was a vessel that could be filled with arguments that defined privacy based on artificial criteria resembling the legal fictions of the *Olmstead* regime. Harlan favored the development of the expectations concept through use of analogies to prior opinions that attempted to construct more meaningful criteria for the evaluation and recognition of privacy interests. In the years following the *White* decision, Harlan's voice was replaced with those of other justices. As the privacy debates continued, Court majorities often reached decisions that rejected privacy claims and ignored the path of analysis that Harlan proposed in *White*.

B. The Free Society and the Return of Olmstead

When Harlan declared in his *White* dissent that the task of the law is to "form and project" the values and customs of the future,²⁹³ his words sounded the theme of the Brandeis dissent in *Olmstead*, that "[i]n the application of a Constitution, our contemplation cannot be only of what has been, but of what may

²⁹⁰ *Mancusi*, 392 U.S. at 369.

²⁹¹ *Id.* at 373-74 (Black, J., dissenting).

²⁹² *Id.* at 377 (White, J., dissenting).

²⁹³ *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

be.”²⁹⁴ Harlan described *Berger* as “following a path opened by Mr. Justice Brandeis’s dissent in *Olmstead*,” which was “smoothed” in the pre-*Katz* cases,²⁹⁵ and led to the Court’s conclusion that modern electronic devices must be regulated because they “are capable of eavesdropping on anyone in most any given situation.”²⁹⁶ In Harlan’s view, *Berger* brought to life the legacy of Brandeis’s arguments, in leaving “no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised ‘bugging.’”²⁹⁷ Harlan also quoted from *Boyd v. United States*,²⁹⁸ first, concerning the need to prevent unconstitutional practices from obtaining “their first footing . . . by silent approaches and slight deviations from legal modes of procedure,”²⁹⁹ and later, concerning the need to protect “liberty and security” from “all invasions . . . of the sanctity of . . . home and the privacies of life.”³⁰⁰

Harlan’s *White* dissent supplied the foundation that was missing from *Katz*. Four years earlier, “Stewart’s opinion for the Court in *Katz* was . . . notable for what it did not say,” for relying neither “on *Boyd* [n]or on Brandeis’[s] dissent in *Olmstead*,” and for offering “no broad philosophical basis for its decision.”³⁰¹ Perhaps these gaps in *Katz* explain why Justice Harlan’s twenty-seven words from *Katz* “endured,”³⁰² and why his *White* dissent continues to attract the endorsement of state court judges through incorporation into state constitutional doctrine.³⁰³ Harlan’s dissent expressed concern for the protection of

²⁹⁴ *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (internal quotations omitted).

²⁹⁵ *White*, 401 U.S. at 779.

²⁹⁶ *Berger v. New York*, 388 U.S. 41, 47 (1967); see *White*, 401 U.S. at 779 (Harlan, J., dissenting).

²⁹⁷ *White*, 401 U.S. at 779.

²⁹⁸ 116 U.S. 616 (1886).

²⁹⁹ *White*, 401 U.S. at 789 (quoting *Boyd*, 116 U.S. at 635).

³⁰⁰ *Id.* at 793 (quoting *Boyd*, 116 U.S. at 630).

³⁰¹ CLANCY, *supra* note 107, at 58.

³⁰² *Id.* at 60.

³⁰³ See, e.g., *State v. Goetz*, 191 P.3d 489 (Mont. 2008); *State v. Mullens*, 650 S.E.2d 169 (W. Va. 2007); *State v. Geraw*, 795 A.2d 1219 (Vt. 2002); *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1995); *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987); Melanie L. Black Dubis, *The Consensual Electronic Surveillance Experiment: State Courts*

the “sense of security . . . that is characteristic of individual relationships between citizens in a free society.”³⁰⁴ This concern inspires the views of scholars who advocate that unregulated surveillance should not diminish the amount of privacy and freedom “to a compass inconsistent with the aims of a free and open society.”³⁰⁵ Justice Harlan’s foresight concerning the dangers of unregulated government surveillance was invoked in discussions of the secret presidential order of 2002 to authorize “domestic spying” on citizens.³⁰⁶ Yet Harlan’s dissent did not sway the Supreme Court majority that later endorsed the *White* plurality’s position,³⁰⁷ and the *White* decision had profound effects on the Court’s privacy analysis during subsequent decades, wrapped in the rhetoric of Harlan’s twenty-seven words about “reasonable” expectations.

Based on Justice White’s premise in *White* that *Katz* left *On Lee* undisturbed, the *White* decision might be viewed as carving out a niche for informant cases, so that the rationales of *Hoffa*, *On Lee*, and *White* would continue to remain undisturbed by whatever *Katz* might mean.³⁰⁸ But this interpretation would not take account of how *Katz*’s right of conversational privacy was disturbed by *White*. Although the *Katz* Court protected a person’s conversations from warrantless surveillance by devices attached to objects like telephone booths, the *White* plurality did not protect conversations from such surveillance by devices attached to people. Implicitly, the *White* plurality charged everyone “with the knowledge that when they speak, they may be speaking to the government.”³⁰⁹ As one scholar reasoned, given

React to United States v. White, 47 VAND. L. REV. 857 (1994); Carol M. Bast, *What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837 (1998).

³⁰⁴ *White*, 401 U.S. at 787.

³⁰⁵ Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 594 (1989) (quoting WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE*, §3.2, at 99 (1985), for approval of privacy values expressed in *Amsterdam*, *supra* note 15, at 403).

³⁰⁶ See Doernberg, *supra* note 41, at 290.

³⁰⁷ See Maclin, *supra* note 11, at 215 n.127 (citing *United States v. Caceres*, 440 U.S. 741, 744 & n.2 (1979)).

³⁰⁸ *Id.* at 215 (noting that the *White* decision demonstrated the “reasoning of *Katz* would have no impact on the law governing the use of informers and secret agents”).

³⁰⁹ Doernberg, *supra* note 41, at 292.

that "one never knows when the government may be listening," then the right of conversational "privacy vanishes whenever one communicates with another person."³¹⁰ No wonder, then, that *White* has been described as "inconsistent" with *Katz*.³¹¹

The possibility that *White*'s impact might be confined to informant cases was undermined by the fact that Justice White used the "expectations of privacy" rhetoric as the frame around the "risk" analysis borrowed from *Hoffa* as a core rationale in *White*.³¹² In later cases, the Court developed the idea that a person's expectations should encompass the assumption of a risk of police surveillance, by drawing upon the *Katz* Court's observation concerning the lack of Fourth Amendment protection for "[w]hat a person knowingly exposes to the public, even in his own home or office."³¹³ Justice Harlan's *Katz* concurrence implied that only obvious examples of demonstrated indifference to privacy concerns would fail to satisfy the requirement of "subjective" manifestation of a privacy interest, such as the case of the loud talker inside a house who can be heard through an open window by people outside.³¹⁴ But the Court did not limit the concept of knowing exposure to match Harlan's category,³¹⁵ and instead blended the ideas of knowing exposure and assumption of risk into the analysis of reasonable expectations of privacy.

Another legacy of *White*'s approach to privacy analysis was inspired by Justice White's use of "inexorable logic" reasoning

³¹⁰ *Id.* at 308. *Cf. id.* (arguing that the Court "used *Katz*'s rationale *de facto* to overrule one of the central holdings of *Katz*").

³¹¹ Colb, *supra* note 236, at 141. See Peter P. Swire, *Katz is Dead, Long Live Katz*, 102 MICH. L. REV. 904, 910-11 (2004) (noting the Stored Communications Act of 1986 allows the government to obtain warrantless access to the content of stored telephone calls, so that as larger percentage of calls are stored, the protection for these calls provided by *Katz* and *Berger* will disappear).

³¹² See *United States v. White*, 401 U.S. 745, 751-52 (1971). *Cf. Maclin, Informants*, *supra* note 168, at 621 (describing use of expectations analysis as "meaningless" in the *White* plurality opinion).

³¹³ *Katz v. United States*, 389 U.S. 347, 351 (1967) (citing *United States v. Lee*, 274 U.S. 559, 563 (1927) (holding the use of a search light at sea was not a "search"); *Lewis v. United States*, 385 U.S. 206, 210 (1967)).

³¹⁴ See *supra* note 134 and accompanying text.

³¹⁵ See *Serr*, *supra* note 305, at 624 (arguing that Stewart's reference to "knowing exposure" in *Katz* was an illustration of Harlan's lack-of-subjective-expectation category, and was not intended to be "the *sine qua non* of fourth amendment protection").

based on *Hoffa*. This reasoning implies that debates about new privacy claims can be resolved through reliance on logical extensions of privacy or no-privacy holdings, taken in isolation from the context of other privacy and search precedents. The “inexorable logic” reasoning contributed to the Court’s post-*Katz* tradition of evaluating new claims primarily by making analogies to past privacy claims, many of which have been rejected since *Katz*.³¹⁶

The Court’s post-*White* privacy precedents illustrate how Harlan’s “should” question about expectations and risks has been reformulated as an inquiry concerning logical inferences about the “knowing exposure” of a privacy interest. That is, if it appears that an individual knowingly exposed something, such as a garbage bag on a curb or heat emanating from a house, to a hypothetical observant member of the public, then the Court may choose to infer that privacy claimant knowingly exposed the garbage or the heat to police detection, and conclude that an expectation of privacy from such detection would be unreasonable.³¹⁷ After *Katz*, the isolation of the privacy precedents meant that the Court did not have to reconcile their rationales with the reasoning in the search precedents reflecting the expansion of the territory of the warrant requirement. Justice Harlan viewed these precedents as relevant sources to support the recognition of the privacy interest in *White*.³¹⁸

Given the fact that *Katz* overruled *Olmstead*, it might seem astonishing to claim that the *White* decision accomplished “a return to *Olmstead*’s idea that words are not within the Fourth

³¹⁶ See CLANCY, *supra* note 107, at 62-64 (enumerating rejected claims). Cf. *California v. Ciraolo*, 476 U.S. 207, 214-15 (1986) (relying on *Knotts v. United States*, 460 U.S. 276 (1983) and reasoning that unregulated helicopter surveillance of people in their back yards is justifiable as a logical extension of unregulated automobile surveillance of people traveling on streets and highways); Catherine Hancock, *Justice Powell’s Garden: The Ciraolo Dissent and Fourth Amendment Protection for Curtilage Home Privacy*, 44 SAN DIEGO L. REV. 551, 562 (2007) (contrasting the “precedential power of analogy-making” by the *Ciraolo* majority with the different approach of the *Ciraolo* dissent).

³¹⁷ Compare *California v. Greenwood*, 486 U.S. 35, 40 (1988) with *Kyllo v. United States*, 533 U.S. 27, 42-44 (2001) (Stevens, J., dissenting).

³¹⁸ Cf. Hancock, *supra* note 316, at 560-61 (explaining how Justice Powell’s dissent in *Ciraolo* relied on search precedents as well as privacy precedents as sources for determining expectations of “freedom from surveillance”).

Amendment's protection."³¹⁹ However, even without expressing that sentiment directly, the *White* plurality did condition the exercise of the right to conversational privacy on the government's lack of interest in using a wired informant to listen to conversations. One thread of *Olmstead*'s reasoning received no attention in the *White* opinions, perhaps because the express reasoning of *Katz* repudiated it. The *Olmstead* opinion reasoned that anyone "who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside." This argument could be translated into the proposition that every telephone user must assume the risk that a wiretapping agent is listening.³²⁰ Similarly, the *Goldman* opinion reasoned that *Olmstead* should control the Court's decision, without actually saying that the *Goldman* defendants should have assumed that the office walls around them "had ears."³²¹ The *White* plurality opinion did not actually say the *White* defendant or anyone else should assume that the next person to whom they speak is a wired listener, whose power depends on the discretion of the government. But the *White* decision made that fact true.

CODA

Thirty years after Justice Harlan's retirement, each of his former law clerks contributed a brief "remembrance" to memorialize the anniversary of that event, and their recollections illustrate four hallmarks of Harlan's work in his *White* dissent. First, he "demanded, and strove for, clarity in his judgments,"³²² and "he wanted the arguments that formed his opinions to be

³¹⁹ Doernberg, *supra* note 41, at 308.

³²⁰ *Olmstead v. United States*, 277 U.S. 438, 466 (1928). *But see* *Katz v. United States*, 389 U.S. 347, 352 (1967) (reasoning that the *Katz* defendant was "surely entitled to assume that the words he utters into the mouth piece will not be broadcast to the world").

³²¹ For an example of a society where the walls "had ears," *see generally* DAS LEBEN DER ANDEREN [THE LIVES OF OTHERS] (Arte 2006).

³²² Charles Fried, *in* REMEMBRANCES, *supra* note 15, at 152. *See also* Norbert A. Schlei, *in* REMEMBRANCES, *supra* note 15, at 146 (noting that when Harlan received a draft opinion from a clerk, he copied out every word in longhand, "in order to force himself to think through every word, every sentence, to make sure it said what it should say and nothing else").

transparent, never hiding a premise or sliding over a fallacy or ignoring an ellipsis to reach a result.”³²³ He regarded “[a] rhetorical glide over a gap or fault in reasoning, an imperious *ipse dixit*” not only as “professional lapses” but as conduct that showed a “profound lack of courtesy towards those who must study, follow, and live with the consequences of what the Court decreed.”³²⁴ Second, regarding both his opinion writing and his treatment of others, one clerk recalled that “never did he ever say a harsh personal word about one of his colleagues, or indeed about anyone else.”³²⁵ Another clerk noted that Harlan “exemplified civility and tolerance” and that the “[a]cerbic personal references to other Justices, now featured in some opinions, would have distressed him.”³²⁶ Harlan’s criticism of the *White* plurality opinion, for example, featured mild expressions such as the observation that one of the plurality’s arguments “misses the mark entirely.”³²⁷

Harlan’s *White* dissent also displayed his willingness and ability to change his mind. One clerk reported that “[h]e was always open to argument,”³²⁸ while another remembered “watching him change his mind two or three times as he weighed the merits and decided how to vote” in some cases.³²⁹ In his *Lopez* opinion, Harlan concluded his analysis with the observation that the defendant’s argument “amounts to saying that he has a constitutional right . . . to challenge [an] agent’s credibility without being beset by corroborating evidence.”³³⁰ Harlan ex-

³²³ Heymann, *supra* note 15, at 152.

³²⁴ Fried, *supra* note 322, at 152.

³²⁵ Matthew Nimetz, in REMEMBRANCES, *supra* note 15, at 162; Kent Greenawalt, in REMEMBRANCES, *supra* note 15, at 158 (recalling that “[d]espite legal disagreements that nearly always left him in the minority, he expressed good feelings about the other Justices, declining, as many people would, to personalize disputes of substance or to attribute unwise judgment to stupidity or bad faith”).

³²⁶ Charles Lister, in REMEMBRANCES, *supra* note 15, at 162.

³²⁷ *United States v. White*, 401 U.S. 745, 789 (1971) (Harlan, J., dissenting).

³²⁸ *See, e.g.,* Lister, *supra* note 326, at 162.

³²⁹ Stoel, *supra* note 248, at 165. *See* Leonard M. Lieman, in REMEMBRANCES, *supra* note 15, at 146 (remembering Harlan as “independent and open-minded”).

³³⁰ *Lopez v. United States*, 373 U.S. 427, 439 (1963). *Cf.* Brief for the United States, *supra* note 7, at 18 (describing the “only interests of which [the defendant] was deprived by the transmitting device” as being “those which directly violate the integrity of the criminal process”).

plained in his *White* dissent, "I am now persuaded that such an approach misconceives the basic issue"³³¹ In his dissent in *On Lee*, Justice Douglas described his realization that he voted the wrong way in *Goldman*.³³² Justice Harlan's *White* dissent echoed the themes in Douglas's own *White* dissent, along with the themes of the *Lopez* dissenters.³³³

Finally, Harlan's "love for the law and the Court" was vividly recalled by his clerks.³³⁴ During his final term, his clerks devoted sixty hours a week to the chore of reading to Harlan because he was nearly blind.³³⁵ He wrote the *White* dissent during the last four months of that term, when he suffered from severe lower back pains, diagnosed the following autumn as the symptoms of cancer.³³⁶ Yet Harlan continued to "give his all" to the Court.³³⁷ In *White*, he gave his all to the Fourth Amendment.

³³¹ *White*, 401 U.S. at 788 n.24 (Harlan, J., dissenting). Cf. *id.* (noting that "the continuing vitality of *Lopez* is not drawn directly into question" in *White*, and not joining other *White* opinions which advocated overruling of *Lopez*).

³³² *On Lee v. United States*, 343 U.S. 747, 762 (1952) (Douglas, J., dissenting) (observing, "I now more fully appreciate the vice of the practices spawned by *Olmstead* and *Goldman*. Reflection upon them has brought new insight to me. I know feel that I was wrong in the *Goldman* case.").

³³³ Compare *White*, 401 U.S. 756-57, 759-60 (Douglas, J., dissenting), with *id.* at 789-90, 787-88, 778 & n.12 (Harlan, J., dissenting).

³³⁴ Nimetz, *supra* note 325, at 161; cf. E. Barrett Prettyman, Jr., in REMEMBRANCES, *supra* note 15, at 145 (reporting that Harlan "loved discussions about every aspect of the law"); Fried, *supra* note 322, at 151 (noting that Harlan's "love for the Court and for the rule of law was legendary").

³³⁵ YARBROUGH, *supra* note 4, at 325.

³³⁶ See YARBROUGH, *supra* note 4, at 330-335 (describing how, after months of medical tests, Harlan retired after receiving the diagnosis of spinal cancer in late September, and died on December 29, 1971).

³³⁷ Schlei, *supra* note 322, at 146 ("The Justices he respected most were not necessarily those who agreed with him most often but those who felt as he did about the importance of the work of the Court and gave their all to it.").

KNOWING "CONSENT" MEANS "KNOWING CONSENT": THE UNDERAPPRECIATED WISDOM OF JUSTICE MARSHALL'S *SCHNECKLOTH V. BUSTAMONTE* DISSENT

*Arnold H. Loewy**

The first task of one who is asked to speak about great Fourth Amendment dissents is to ascertain what constitutes greatness. Historically, greatness has contained two components: prescience and correctness. The former is objective: Did it ultimately prevail? The latter is normative: That is, was it correct in the mind of the evaluator?

Justice Holmes is classically regarded as the Great Dissenter. His classic dissents in Commerce Clause,¹ Due Process,² and Free Speech³ cases are practically the paradigm of great dissents. Of course, one who liked the original result in those cases, but did not like the result in the dissent-inspired sequels would not think of these dissents as great. Indeed, one who thinks that only states should be able to regulate child labor, that no government should be able to regulate wages and hours, and that free speech should only apply to advocacy of lawful activities will rue the existence of Justice Holmes and his "stupid opinions" that others consider great.

By the criteria of prescience and correctness, there are few Fourth Amendment dissents that could be considered great. Perhaps Justice Brandeis's and Justice Holmes's dissents in *Olmstead v. United States*⁴ would qualify, but only one of us

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¹ See *Hammer v. Dagenhart*, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting).

² See *Lochner v. New York*, 198 U.S. 45, 65-72 (1905) (Holmes, J., dissenting).

³ See *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

⁴ See *Olmstead v. United States*, 277 U.S. 438, 471-485 (1928) (Brandeis, J., dissenting), 469-72 (1928) (Holmes, J., dissenting).

could talk about that and Carol Steiker has beaten me to it.⁵ So, I have chosen to rethink the “prescience” criterion.⁶

Indeed, it is the absence of realized prescience that makes Justice Marshall’s dissent in *Schneckloth v. Bustamonte* so tragic. Not only was the majority woefully wrong and the dissent clearly correct (normatively speaking), but the failure of the Court to appreciate the correctness of the dissent has led to a burgeoning jurisprudence of placing a premium on citizens’ ignorance of their Fourth Amendment rights.⁷

For the reasons that I will explain today, it is my fondest hope that the lack of prescience of Justice Marshall’s opinion is not an absence, but merely delayed fulfillment. *Schneckloth* is, after all *only* thirty-six years old. Holmes’s dissent in *Abrams* was not fully accepted for nearly fifty years.⁸ Candidly, but sadly, I have to note that judicial momentum has not been kind to Justice Marshall’s dissent. Indeed, in case after case, as I shall explain, movement has been away from his dissent, and towards enlarging the original error of the majority opinion. So, if you share my assessment of the wisdom of Justice Marshall’s dissent, perhaps the best we can hope for is that Marshall’s opinion was so prescient that its wisdom will be recognized by many judicial generations after the fact.

⁵ Carol Steiker, *Brandeis in Olmstead: “Our Government is the Potent, the Omnipresent Teacher”*, 79 MISS. L.J. 147 (2009).

⁶ Two other dissents that ultimately prevailed that perhaps I could have chosen are Justice Frankfurter’s dissent in *United States v. Rabinowitz*, and Justice Douglas’s dissent in *Wolf v. Colorado*. *United States v. Rabinowitz*, 339 U.S. 56, 68-86 (1950) (Frankfurter, J., dissenting), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969) (adopting Justice Frankfurter’s dissent in *Rabinowitz*); *Wolf v. Colorado*, 338 U.S. 25, 40-41 (1949) (Douglas, J., dissenting), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961) (adopting Justice Douglas’s dissent in *Wolf*). Ironically, both *Chimel* and *Mapp* are on shakier ground now than when they were decided, largely because of the work of Justice Scalia. See *Thornton v. United States*, 541 U.S. 615, 625-32 (2004) (Scalia, J., concurring); *Arizona v. Gant*, 129 S. Ct. 1710, 1724-25 (2009) (Scalia, J., concurring); *Hudson v. Michigan*, 547 U.S. 586 (2006).

⁷ See Arnold, H. Loewy, *Police, Citizens, the Constitution, and Ignorance: The Systematic Value of Citizen Ignorance in Solving Crime, Police Deception, and the Constitution: A Symposium*, 39 TEX. TECH L. REV. 1077 (2007).

⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 451-52 (1969).

I. THE FACTS

At 2:40 in the morning, while driving the streets of Sunnyvale, California, with five passengers, Joe Gonzalez was pulled over by Officer James Rand for driving with a burned-out headlight and license plate light.⁹ Gonzalez could produce neither registration for the vehicle nor a driver's license.¹⁰ The other five passengers were then asked for evidence of identification, and only one passenger, Joe Alcala, was able to produce a driver's license, and he claimed that the car belonged to his brother.¹¹

Then, according to the Court: "[T]he six occupants . . . stepped out of the car at the officer's *request*. . . ."¹² Surely, the word "request" is misleading. Assuming the officer said something like: "Will you please step out of the car," it seems highly unlikely that the occupants really believed they had a choice. And if they did, they would have been wrong.¹³ Surely six men driving around in a car with no proof of ownership and most with no identification could not have believed that they were free to ignore the officer's request (or more accurately, polite demand) to exit the car.

Then, two more officers arrived.¹⁴ After being buttressed by these reinforcements, Officer Rand "*asked* Alcala if he could search the car."¹⁵ Alcala responded: "Sure, go ahead."¹⁶ There is no allegation that officer Rand used any coercion beyond that inherent in an officer's politely demanding that six people leave their undocumented car at nearly three in the morning after two reinforcement officers had driven up to join the show of force before the requested search.¹⁷ The police found a stolen

⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (emphasis added).

¹³ See generally the later case of *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (holding that a police officer may order both the driver and passenger out of the vehicle after a lawful traffic stop).

¹⁴ *Schneckloth*, 412 U.S. at 220.

¹⁵ *Id.* (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

check which was used to convict one of the car's passengers, Robert Bustamonte.¹⁸

II. NON-ISSUES

There are three possible ways the Court might have decided the case without having to consider the consent issue. Of these three, two were never argued, and the third, which was argued, was not considered by the Court.

First, it would have been possible to argue that given all of the circumstances of this case, six men, near three in the morning, no proof of car ownership, etc., that a search of the car should have been deemed reasonable under the Fourth Amendment. Though not devoid of plausibility, the Government did not choose to make that argument, and the case was decided as though there were no probable cause, or even reasonable suspicion. Consequently, that option was off the table.

Second, it would have been possible to decide that as a mere passenger in the vehicle, Bustamonte lacked standing to challenge the constitutionality of the search. Though a similar position was sustained several years later in *Rakas v. Illinois*,¹⁹ it was neither suggested nor considered in this case. Thus, the case proceeded on the assumption that Bustamonte had standing to challenge the illegality of the search. So this option was also off the table.

Finally, it would have been possible to conclude that Bustamonte's Fourth Amendment claim was not cognizable on habeas corpus, as the Court held a few years later in *Stone v. Powell*.²⁰ Unlike the other two non-issues, this one actually was argued, and three of the Justices (Powell, Burger, and Rehnquist) would have found against Bustamonte on that ground alone.²¹ Justice Blackmun was prepared to join them, but for his belief that it was unnecessary due to his agreement with the majority opinion (which Powell, Burger, and Rehnquist also joined).²²

¹⁸ *Id.*

¹⁹ See *Rakas v. Illinois*, 439 U.S. 128, 132-38 (1978).

²⁰ 428 U.S. 465, 494 (1976).

²¹ *Schneekloth*, 412 U.S. at 250 (Powell, J., concurring).

²² *Id.* at 259 (Blackmun, J., concurring).

Consequently, although the case might have been disposed of on that ground, it was not.

The upshot of all of this is that, while there may have been several reasons to find against Bustamonte, the *only* one relied on by the Court was that his otherwise valid and cognizable Fourth Amendment right was waived by Alcala's consent to the search.

III. THE LOGIC OF THE MAJORITY

Justice Stewart, who wrote the majority opinion began by narrowing the conflict, noting that Bustamonte had conceded "that a search conducted pursuant to a valid consent is constitutionally permissible,"²³ and that the prosecutor had conceded that "he has the burden of proving that the consent was, in fact, freely and voluntarily given."²⁴ Stewart then concluded that the issue squarely presented was whether a consent could be proven voluntary without proof that the defendant was aware of his right to decline consent.

Obviously, the word "voluntary" is capable of multiple meanings. In the criminal law, for example, as applied to *actus reus*, the term simply means a muscularly willed movement.²⁵ Thus, if one consciously moves his finger, he would be said to have voluntarily acted even if he did not know that his finger was on the trigger of a gun and another person was in the line of fire.²⁶ The defendant might be able to defend (if it were true) on the ground that he did not act knowingly, recklessly, or negligently, but he could not claim that he didn't act voluntarily.

Fortunately, Justice Stewart did not define "voluntary" so narrowly.²⁷ Rather, he focused on the cases dealing with "voluntary confessions."²⁸ There the Court employed a balancing test, never relying on any one factor, including the defendant's

²³ *Id.* at 222 (majority opinion).

²⁴ *Id.* (internal citations omitted).

²⁵ FREEDOM AND RESPONSIBILITY 129-30 (Herbert Morris ed., Stanford University Press 1961).

²⁶ *Id.*

²⁷ *Schneckloth*, 412 U.S. at 218.

²⁸ *Id.* at 227.

awareness of his right to remain silent.²⁹ Thus, Justice Stewart concluded that awareness of the right to decline consent was only one factor (and apparently not a terribly important one) in assessing voluntariness (and hence validity) of consent.³⁰

Ironically, probably the least controversial aspect of the *Miranda* case, which essentially rendered voluntariness largely irrelevant in the area of confessions, was the requirement that the arrestee be told that he had a right to remain silent.³¹ The dissents and much of the literature criticized the Court for announcing a right to counsel during interrogation, but nobody seriously questioned the right of the defendant to know of his right to remain silent.³² Even Professor (and former Federal Judge) Paul Cassell, one of *Miranda's* most vehement critics, does not quarrel with the requirement that an accused be informed of his right to remain silent.³³

So what value did the Court think it was serving by allowing ignorant consent? The Court put it this way:

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more

²⁹ *Id.*

³⁰ *Id.* at 218.

³¹ *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).

³² See, e.g., *id.* at 504-26 (Harlan, J., dissenting).

³³ See Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 257 (1999).

extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is constitutionally permissible and wholly legitimate aspect of effective police activity.³⁴

Of course, these are good reasons to encourage consent. As the Court put it later in its opinion, "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."³⁵ But what is noticeably lacking in Justice Stewart's opinion is a reason for valuing the searchee's ignorance.

Let me illustrate the difference. Assume I am driving from Lubbock to Dallas in my white Saturn. Assume further that a policeman pulls me over and tells me the following: "We had a report that somebody driving a white Saturn from Lubbock to Dallas is carrying heroin in his trunk. I'd like to search your trunk to see if it's you. You don't have to let me, but I'd sure appreciate it if you did." I might well decide as a good citizen, as well as one who would like to remove a cloud of suspicion, that consenting to this polite request to search would be a good idea.

Now, change the facts slightly. This time the officer stops me and asks if I am carrying drugs. Upon my negative response, he asks: "May I search your car?" Although I may be aware that "no" is a permissible response, most drivers would not. They would yield to authority because they think they have to rather than because they want to. Unlike the first hypothetical, this is not "responsible citizenship." It is ignorant submission.

Basically, the Court seems to take two positions: (1) coerced consent is forbidden and (2) unknowing consent is not. Thus, if the police ask nicely, and the suspect consents, all is good because coercion is absent. Indeed, if one believes that unknowing consent can render a search reasonable, there is little to quarrel with the Court's opinion.

³⁴ *Schneckloth*, 412 U.S. at 227-28.

³⁵ *Id.* at 232 (quoting *Miranda*, 384 U.S. at 477-78).

It should be noted that although the effect of the decision is to allow ignorant consents, its concern appears more related to burden of proof. The Court talks about the "near impossibility of meeting this prosecutorial burden."³⁶ The Court suggests and rejects what one might have thought was the obvious answer to its conundrum: "[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."³⁷ So, in the Court's view, because a warning would be impractical, proving knowing consent would be an impossible burden.

Undoubtedly, if the Court's impracticality premise were correct, its conclusion would be arguable. As will become apparent when we examine Justice Marshall's "great" dissent, a warning would not be at all impracticable. Furthermore, if the impracticality of proving consent were really driving the Court's opinion, presumably the Court would have at least excluded evidence where the defendant could show that he did not know that he could refuse. Yet as the great dissent pointed out, the Court did not even accept this modest proposal.

IV. THE GREAT DISSENT

Justice Marshall begins his opinion by referring to the Court's "*curious result* that one can choose to relinquish a constitutional right—the right to be free from unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request."³⁸ If anything, Justice Marshall was charitable in his use of the word "curious." If he were wont to speak like Chief Justice Burger, he might have used the word "bizarre."³⁹ Or to be completely accurate, he could have said "oxymoronic."

³⁶ *Schneckloth*, 412 U.S. at 230.

³⁷ *Id.* at 231.

³⁸ *Id.* at 277 (Marshall, J., dissenting) (emphasis added).

³⁹ See *Brewer v. Williams*, 430 U.S. 387, 417 (1977) (Burger, C.J., dissenting) ("I categorically reject the remarkable notion that the police in this case were guilty of unconstitutional misconduct, or any conduct justifying the *bizarre* result reached by the Court.") (emphasis added). See *Maine v. Moulton*, 474 U.S. 159, 181 (1985) (Burger, C.J., dissenting) ("Nothing whatever in the Constitution or our prior opinions supports this *bizarre* result, which creates a new 'right.'") (emphasis added).

So one might ask, what is so "great" about recognizing such an obvious truism? My answer is that when one can see the obvious where all others are missing it, there is something great about the person who sees it. Perhaps it is nothing more than the ability to avoid distracting irrelevancies, much like the boy who knew that the emperor had no clothes.⁴⁰

In criticizing the Court's reliance on the concept of "voluntary" in the confession cases, Marshall makes what might be his most telling point in, of all places, a footnote. Though not yet having reached the notoriety of *Carolene Products*' famous footnote 4⁴¹ or *Brown v. Board of Education*'s footnote 11,⁴² the wisdom of Justice Marshall's footnote 6 should not be ignored. In response to the Court's contention that voluntary consent means the same thing as voluntary confession, footnote 6 says: "That this application of the 'domino' method of adjudication is misguided is shown, I believe, by the fact that 'voluntary consent' seems redundant in a way that the phrase 'voluntary confession' does not."⁴³

To illustrate, the phrase "involuntary confession" seems to accurately describe the situation where a police officer tortures a suspect into confessing. We would say that he confessed, but it was involuntary. On the other hand, where an officer tortures a suspect until he consents to a search, we would not say that he involuntarily consented. We would, instead, say that he did not consent at all. Indeed, that was essentially the Court's holding in *Bumper v. North Carolina*, where a woman consented to a search only after being told that the police had a search warrant.⁴⁴

Building on this dichotomy, Justice Marshall proceeds to distinguish "coercion" from "consent," explaining that voluntariness is relevant to the issue of coercion, but not to consent.⁴⁵

⁴⁰ See HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes*, in ANDERSON'S FAIRY TALES 263 (Mrs. E. V. Lucas & Mrs. H.B. Paull, trans., Grosset & Dunlap 1945) (1837).

⁴¹ *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

⁴² *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n.11 (1954).

⁴³ *Schneekloth*, 412 U.S. at 280 n.6 (1973).

⁴⁴ See *Bumper v. North Carolina*, 391 U.S. 543, 546-47 (1968).

⁴⁵ *Schneekloth*, 412 U.S. at 283-84 (Marshall, J., dissenting).

He uses *Bumper* as an illustration, noting that, while under all of the circumstances of that case, the woman's consent may have been involuntary, the decision was not predicated on that ground. Rather, it was predicated on her not making a choice to give up a known right, and thus not consenting at all.⁴⁶ By way of illustration, consider the rapist who points a gun at his victim, saying, "Consent to sex or I'll blow your brains out." We would not treat her "ok" as an involuntary consent. We would say that she did not consent at all.

The great dissent then goes on to suggest that, "If the consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police."⁴⁷ Marshall adds, "I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course that he might have pursued."⁴⁸

Frankly, I find such logic impossible to refute, which may explain why the Court never attempted to refute it. Rather, the Court did what it must when confronted with this kind of logic against its position. It ignored it. Plausibly, I suppose one could have argued with Marshall's dependent clause, ("[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search"⁴⁹) and contended instead that an uncoerced, albeit unknowing, consent rendered the search reasonable.

Such was the logic of the Court's subsequent decision, *Illinois v. Rodriguez*,⁵⁰ a decision with which I have no quarrel. In *Rodriguez*, again over Marshall's dissent, the Court held that consent predicated on a reasonable belief that the defendant's former co-tenant had authority to consent to a search, rendered

⁴⁶ *Id.*

⁴⁷ *Id.* at 284-85.

⁴⁸ *Id.* at 285.

⁴⁹ *Id.* at 284.

⁵⁰ 497 U.S. 177, 188-89 (1990) (Marshall, J. dissenting).

the search reasonable, and thus constitutional.⁵¹ Thus, if the Court had found that Officer Rand reasonably believed that Alcala had knowingly consented to the search of the car, and that the search was therefore reasonable, the opinion would have made a great deal more sense (though candidly Marshall still would not have agreed with it).⁵²

Of course, there is no evidence that Officer Rand thought any such thing. Instead, the Court was willing to go with the untenable proposition that absent actual consent, the search would have been invalid, but one can give up his constitutional right to be free from an unreasonable search, even if in doing so, he did not know that he had a choice. So, rather than quarreling with Marshall's logic, the Court simply ignored it.

Marshall then jumps to the heart of the majority's reasoning, namely that a warning would be impractical because it would break the informality. He understates: "I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know."⁵³ Indeed, I wish he had gone further and spelled out his obvious truism inasmuch as it was not so obvious to the majority. He could have used the following illustration: "Joe, I'd like you to let me search your car. You don't have to if you don't want to, but I'd sure appreciate it if you did."

How on earth can a warning like that be said to break the informality? That question, I think is unanswerable. Indeed, such a warning would have made the discussion less formal, not more, causing Marshall to "conclude with some reluctance that when the Court speaks of practicality, what it is really talking of is the continued ability of the police to capitalize on the ignorance of citizens to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights."⁵⁴ He adds: "Of course it would be

⁵¹ Cf. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005).

⁵² See *Rodriguez*, 497 U.S. at 189-98 (Marshall, J., dissenting).

⁵³ *Schneekloth*, 412 U.S. at 287 (Marshall, J., dissenting).

⁵⁴ *Id.* at 288.

'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the boards."⁵⁵

These sentences are truly "The Emperor has no clothes" coup de grace.⁵⁶ He strips bare the Court's ridiculous assertion of the need for informality, then lays out in no uncertain terms precisely what was afoot: the Court's disrespect of sound Fourth Amendment theory.

And, for those who might think, "Oh well, another criminal is off the street and no harm done," let us not forget Justice Marshall's concern for the innocent. How, one might ask, are the rights of innocent people relevant? The answer, as I have written elsewhere,⁵⁷ is that the procedure sanctioned in this case will subject far more innocent people to a search because they may consent when they think they have no choice. Indeed, it is at least possible that Alcala, who may have believed he had nothing to hide, and so far as we know was innocent, believed that he had no choice after being confronted by Officer Rand and the two other policemen who drove up behind him in the wee hours of the morning.

More importantly, as we look at what *Schneckloth* has wrought, we will get some idea of how many innocent people have been unnecessarily subject to a search that (1) would have been unlawful without their consent and (2) for which they had no idea that they were free to "just say no."

V. WHAT *SCHNECKLOTH* HATH WROUGHT (*OHIO V. ROBINETTE*)

For the Supreme Court, *Ohio v. Robinette*⁵⁸ was an easy case, wrongly decided by the Ohio Supreme Court, in light of *Schneckloth*. Robinette was stopped by Officer Robert Newsome for speeding in a construction zone.⁵⁹ Robinette gave Newsome

⁵⁵ *Id.*

⁵⁶ See ANDERSEN, *supra* note 40.

⁵⁷ See generally Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1257-59 (1983).

⁵⁸ 519 U.S. 33 (1996).

⁵⁹ *Id.* at 35.

his license and exited the car after being asked to do so.⁶⁰ Newsome then returned Robinette's license and issued him a warning.⁶¹ Then, as captured by Newsome's video camera, the following dialogue occurred:

Newsome: "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"

Robinette: "No."⁶²

Newsome then asked for and received consent to search Robinette's car where he found a small amount of illegal drugs.⁶³

The Ohio Supreme Court reversed Robinette's conviction, holding that before a police officer could seek consent to search, he was required to tell the motorist that he was free to leave.⁶⁴ Relying on and quoting *Schneckloth*, Chief Justice Rehnquist opined:

And just as it 'would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,'⁶⁵ so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.⁶⁶

Well, far be it from me to advocate unrealism. Indeed, if *Schneckloth* had been correctly reasoned there is some logic to extending it to a person's false belief that he is not being detained. But how many people who have been stopped by a policeman, given a warning ticket, and heard the policeman utter the words "Before you get gone," would know they were free to leave? Yet, if the driver were not free to leave, as he almost certainly believed was the case, the consent would not have been

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 36.

⁶³ *Id.* at 35-36.

⁶⁴ *Id.* at 38.

⁶⁵ *Schneckloth*, 412 U.S. at 231.

⁶⁶ *See Robinette*, 519 U.S. at 39-40.

valid (unless, of course, the policeman had a right to detain him, which nobody on the Court even suggested was the case).⁶⁷

So what does all this mean for the innocent driver, who unlike Robinette has nothing to hide? It means that large numbers of them are going to be stopped for minor traffic offenses, asked for consent to search with no understanding of either their right to leave or their right to say "no." How many? Well, Deputy Newsome testified that he routinely requested permission to search automobiles that he stopped for traffic violations.⁶⁸ And, in another case, he testified that in the year of Robinette's arrest, he requested consent in 786 traffic stops.⁶⁹

Even if we assume that Newsome was above the curve in requesting searches (without telling people that they were either free to leave or free to say "no"), there were probably thousands of motorists in Ohio whose cars were searched, who had no idea that they were free to leave and free to refuse the search. Voluntary cooperation with the police is a wonderful thing and should be encouraged. But the embarrassment, humiliation, and just plain loss of valuable time suffered by our innocent citizens is considerably less wonderful. Let me illustrate. Posit a businessman stopped by Officer Newsome. With no knowledge of his right to refuse, he consents to a search despite being late for a business meeting (which is why he was speeding in the first place). The officer goes through his briefcase looking for drugs, and in the course thereof leaves his business notes in disarray. Consequently, the businessman is both late for his meeting and disorderly in his presentation.

The Government's ability to so inconvenience our citizenry is directly attributable to *Schneckloth's* conclusion that ignorance, even if not bliss, is no cause for Fourth Amendment concern. Justice Marshall understood what such a rule could have on the innocent. If Deputy Newsome is at all typical, his fears have come to pass. Ironically, Deputy Newsome and others like him are no longer free to dupe the citizenry in Ohio, because on

⁶⁷ See, e.g., *Florida v. Royer*, 460 U.S. 491, 498 (1983) (requiring at least reasonable suspicion before one could be justifiably detained).

⁶⁸ *Robinette*, 519 U.S. at 40 (Ginsburg, J., concurring).

⁶⁹ *State v. Retherford*, 93 Ohio App. 3d 586, 594 (1994).

remand, the Ohio Supreme Court held that the Ohio Constitution does require that citizens be informed that they are free to leave before being asked for consent.⁷⁰

CONCLUSION

Nine years, prior to *Schneckloth*, in 1964, Judge Madden of the Ninth Circuit (of all places), with remarkable candor, wrote the following:

While it may not be 'in accord with common experience' for a guilty person to consent to a search which, if successful, may help to prove his guilt, it may nevertheless occur. Happily, not all criminals are highly intelligent and use the most effective tactics in their contacts with the police. Again happily, sometimes their contacts with the police confuse them, and they say and do things which, after deliberation, they regret. To whatever extent stupidity or confusion on the part of the guilty person contributes to the prompt acquisition by the police of evidence of crime, so that the police can get back to work on the numerous cases which may remain unsolved, society is the gainer and nobody is the loser of anything to which he is constitutionally entitled.⁷¹

Frankly, Justice Stewart's opinion in *Schneckloth* said the same thing, but without the transparency of Judge Madden's candor. Even without the transparency, Justice Marshall clearly saw what the decision would do to the innocent, as well as the guilty, and perhaps most importantly to the Constitution that we are all supposed to live under. It is my fondest hope that someday, preferably in my lifetime, the wisdom of this magnificent dissent will be fully appreciated, and that a future Court will return us to the Constitution under which we are supposed to live.

Were this just a law review article, it would end here. But it is not just a law review article; it is an opportunity to speak to state appellate judges, the one group of people who can do some-

⁷⁰ State v. Robinette, 73 Ohio St. 3d 650, 655 (1995).

⁷¹ Martinez v. United States, 333 F.2d 405, 407 (9th Cir. 1964) (quoting United States v. Gregory, 204 F. Supp. 884, 885 (S.D.N.Y. 1962)).

thing about consent searches. You cannot, of course, directly mold federal constitutional law, but you can mold state constitutional law. Under your state constitutional prohibition against unreasonable searches, you have the power to hold that searches conducted pursuant to consent are unconstitutional unless there is good reason to believe that the searchee knew of his right to refuse consent. You could even require that police give a specific warning such as, "You don't have to let me search, but I'd sure appreciate it if you did."

When the result of such a holding overturns a criminal conviction, you might feel some reluctance to so rule (especially if you have to run for reelection). But as Justice Scalia, of all people, once wisely observed, "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."⁷² So, in explaining your opinion, you should emphasize that you are doing it for all of the innocent citizens of your state. You should explain that you are freeing them from being subject to importuning, and frankly bullying, police officers who obtain consent to search from unwitting citizens, simply because they know they can. Ohio took a major step in that direction in *Robinette*, and there is good reason for other states to follow suit.

If you agree with me that the *Schneckloth* domain is not the type of society under which we are supposed to be living, your decisions can make a real difference. First, at minimum, you will free the innocent citizens of your state from such importuning. And second, if enough of you so rule, the Supreme Court is likely to take notice. For example, between 1949 and 1961, enough states chose to adopt the exclusionary rule that when *Mapp v. Ohio*⁷³ was decided, the Court elected to abandon the *Wolf v. Colorado*⁷⁴ majority, and follow its dissent. And thus the exclusionary rule became applicable to the states.

Similarly, it is my firm belief that a groundswell of state indignation towards the *Schneckloth* decision may well cause the Supreme Court to rethink this sorry chapter in our Fourth

⁷² *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

⁷³ 367 U.S. 643, 654-55 (1961).

⁷⁴ 338 U.S. 25, 25-30 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

Amendment jurisprudence. Then perhaps, just perhaps, Justice Marshall's great dissent will become the law of the land.

REASONABLENESS AS A RULE: A PAEAN TO JUSTICE O'CONNOR'S DISSENT IN *ATWATER V. CITY OF LAGO VISTA*

Wayne A. Logan*

When invited to participate in this symposium, and asked to identify a particular dissent from the Supreme Court's Fourth Amendment caselaw to focus upon, many candidates came to mind. The dissents of Justices Douglas in *Terry v. Ohio*¹ and Brandeis in *Olmstead v. United States*² had strong immediate appeal, and indeed are ably addressed by other symposium contributors.³ I wished, however, to consider a dissent of more recent vintage—yet one having similar foundational force relative to Fourth Amendment principles and significant impact on policing and civil liberties. With these criteria in mind, I soon settled upon my dissent of choice: that of Justice Sandra Day O'Connor in *Atwater v. City of Lago Vista*.⁴

Atwater, the “soccer mom” case as it has come to be known, answered a basic question long left unresolved by the Court:

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¹ 392 U.S. 1, 35 (1968) (Douglas, J., dissenting).

² 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

³ See Carol Steiker, *Brandeis in Olmstead: "Our Government is the Potent, Omnipresent Teacher"*, 79 MISS. L.J. 147 (2009); Paul Butler, *"A Long Step Down the Totalitarian Path": Justice Douglas's Great Dissent in Terry v. Ohio*, 79 MISS. L.J. 9 (2009). The question of what qualifies as a great dissent has inspired considerable interest of late. See I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES (Mark Tushnet ed., 2008); William J. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Robert G. Flanders, *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401 (1999); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Allison O. Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008); Randall T. Shepard, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337 (2005).

⁴ 532 U.S. 318 (2001).

whether a warrantless arrest for a minor offense violates the reasonableness clause of the Fourth Amendment, the Amendment's "touchstone."⁵ In her dissent, joined by Justices Stevens, Ginsburg, and Breyer, Justice O'Connor condemned the majority's approval of a motorist's custodial arrest for failure to wear a seatbelt, punishable under Texas law only by a modest fine.⁶ The outcome, O'Connor fairly concluded, afforded police "constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed," an outcome "irreconcilable with the Fourth Amendment's command that seizures be reasonable."⁷ While conceding the administrative appeal of providing police the unqualified right to arrest for any and all offenses, Justice O'Connor asserted that such appeal "by no means trumps the values of liberty and privacy at the heart of the Amendment's protections."⁸ Administrative ease, O'Connor insisted, falls "far short of rationalizing the extraordinary intrusion on Gail Atwater and her children."⁹

The majority's decision to equate probable cause with reasonableness had two major ramifications, according to Justice O'Connor. First, with probable cause now serving as both a necessary and sufficient basis for arrest, police were free to invoke their arrest power for a myriad of minor offenses, having major impact on the "everyday lives of Americans."¹⁰ Second, with broadened warrantless arrest authority comes an "arsenal" of police powers, including the power to search cars and drivers and inventory the contents of their vehicles.¹¹ The "unbounded discretion" afforded police to execute arrests and exercise such powers, Justice O'Connor reasoned, carried a "grave potential for abuse."¹²

⁵ *Samson v. California*, 547 U.S. 843, 855 n.4 (2006).

⁶ *Atwater*, 532 U.S. at 360 (O'Connor, J., dissenting).

⁷ *Id.* at 366.

⁸ *Id.*

⁹ *Id.* at 371, 373.

¹⁰ *Id.* at 371.

¹¹ *Id.* at 372.

¹² *Id.*

In the space available here, I will seek to make the case that Justice O'Connor's *Atwater* dissent, wise when offered almost a decade ago, and prescient in light of subsequent events, is deserving of a place in the pantheon of the Court's great Fourth Amendment dissents.

I. ATWATER AND THE DEMISE OF REASONABLENESS

In March 1997, Gail Atwater was returning home after retrieving her two children (a boy and girl, ages three and five) from soccer practice.¹³ She slowly cruised her neighborhood street in the small community of Lago Vista, Texas, driving the family pickup truck at fifteen miles per hour, in the hope of finding a cherished toy her son had dropped from the vehicle.¹⁴ Police officer Barton Turek observed Atwater, together with her children in the front seat, and noticed that neither Atwater nor her children were wearing seat belts—in violation of Texas statutory law.¹⁵ After detaining Atwater at the side of the road, Turek told her, “We’ve met before,” referring to a prior incident when Turek mistakenly thought Atwater’s son was not wearing a seat belt.¹⁶ He then “yell[ed]” that Atwater was “going to jail”¹⁷ and rejected her request to take the children to a friend’s home nearby, despite the fact that they were “frightened, upset, and crying.”¹⁸ Upon learning that Atwater lacked her driver’s license and insurance documentation because her purse had been stolen, a story he had “heard . . . two-hundred times,”¹⁹ Turek handcuffed Atwater and transported her to the police station (ironically enough, without first attaching her seat belt).²⁰ Upon

¹³ See Ross E. Milloy, *Public Lives: For Seat-Belt Violator, a Jam, a Jail and Unmoved Justices*, N.Y. TIMES, Apr. 28, 2001, at A9.

¹⁴ *Id.*

¹⁵ *Atwater*, 532 U.S. at 323-24.

¹⁶ *Id.* at 324 (citation omitted).

¹⁷ *Id.*

¹⁸ *Id.* Alerted by the commotion, a friend eventually arrived and prevented the children from being taken away by Turek, as he had threatened. *Id.* at 368-69 (O'Connor, J., dissenting).

¹⁹ *Id.* at 324 (majority opinion) (citation omitted).

²⁰ *Id.* at 369 (O'Connor, J., dissenting) (citation omitted). A subsequent inventory of Atwater's truck revealed two tricycles, a bicycle, a cooler, a bag of charcoal, toys, groce-

arriving at the police station, Atwater was stripped of her personal possessions, subjected to a "mug shot," and placed in a booking cell for approximately one hour before she was brought before a magistrate and released on a \$310 bond.²¹ Atwater eventually pled no contest to the seat belt violation and paid a \$50 fine.²²

After city officials rebuffed her request that police receive better training and closer supervision, Atwater filed a civil rights suit under 42 U.S.C. § 1983, alleging the warrantless arrest for the fine-only seatbelt violation constituted an unreasonable seizure under the Fourth Amendment.²³ The trial court entered summary judgment in favor of the defendants, and a panel of the Fifth Circuit reversed.²⁴ On rehearing en banc, the Fifth Circuit again reversed.²⁵ The Supreme Court granted certiorari, agreeing to address whether "the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses."²⁶

By a five-four vote, the Court affirmed.²⁷ Justice Souter's opinion for the majority first examined early common law and framing era authorities on police power to execute warrantless arrests for offenses not involving a "breach of the peace."²⁸ The upshot of this history, he wrote, is that "the common-law commentators (as well as the sparsely reported cases) reached divergent conclusions" on such police authority.²⁹

Justice Souter noted that while several "eminent authorities" supported the view that framing era warrantless arrest

ries, and two pairs of children's shoes. See Linda Greenhouse, *Divided Justices Back Full Arrests on Minor Charges*, N.Y. TIMES, Apr. 25, 2001, at A1.

²¹ *Atwater*, 532 U.S. at 324 (majority opinion).

²² *Id.* Atwater's other charges, driving without a license and failing to provide proof of insurance, were dismissed. *Id.* In addition to the fine, Atwater paid \$110 to retrieve her truck from the police impoundment lot. See Editorial, *An Erosion of Rights*, SALT LAKE TRIB., Apr. 30, 2001, at A10 (on file with author).

²³ See Milloy, *supra* note 13.

²⁴ *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

²⁵ *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (en banc).

²⁶ *Atwater*, 532 U.S. at 326.

²⁷ *Id.* at 322.

²⁸ *Id.* at 327.

²⁹ *Id.* at 328 & n.2.

power was quite limited, the record was insufficient to support a conclusion that Atwater's arrest violated the Fourth Amendment.³⁰ In particular, Justice Souter noted a 1631 English case upholding a warrantless arrest for dice play, later cited by several eighteenth-century commentators for the proposition that nonfelony arrest authority was not limited to breaches of the peace.³¹ Early statutes, he explained, further undermined the view that officers were categorically barred from executing arrests for non-breach-of-the-peace misdemeanors.³²

Justice Souter next evaluated whether subsequent authority or practice clarified the warrantless arrest authority of officers. On this count, he concluded, "the historical record as it has unfolded since the framing" showed an increasing receptiveness to warrantless arrests for non-breach-of-the-peace misdemeanors.³³ In support, Justice Souter quoted Michigan Law Professor Horace Wilgus, who observed in 1924:

The states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than breaches of the peace, if committed in his presence.³⁴

In the ensuing decades, Justice Souter observed, interest in broadened police arrest power continued largely unabated, such that by 2001 statutes in every American jurisdiction permitted officers some degree of warrantless arrest authority for non breach-of-the-peace misdemeanors.³⁵ As a result, Atwater's was "simply . . . not a case in which the claimant can point to 'a clear

³⁰ *Id.* at 329.

³¹ *Id.* at 331 (citing *Holyday v. Oxenbridge*, (1631) 79 Eng. Rep. 805 (K.B.)).

³² *Id.* at 337 (noting, in particular, early English statutes permitting warrantless arrests of persons roaming the streets at night ("night-walkers")). The Court also noted statutes from the eighteenth century and before that targeted gamblers, peddlers, vagrants, and "negligent carriage drivers." *Id.* at 335.

³³ *Id.* at 340-45.

³⁴ *Id.* at 343 (quoting Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 550 & n.54 (1924)).

³⁵ *Id.* at 344-45, 355 app.

answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since."³⁶ The Court therefore was obliged to "strike a current balance between individual and societal interests."³⁷

To the *Atwater* majority, this balance weighed in favor of adopting a rule that, rather than turning on "sensitive, case-by-case determinations," could be easily and readily applied by police.³⁸ The majority rejected *Atwater's* suggestion that police arrest authority depend on whether (1) the underlying offense carried the threat of jail time or (2) it was "necessary for enforcement of the traffic laws," or to halt "[an] offense [that] would otherwise continue and pose a danger to others on the road."³⁹ Tying arrest authority to the gravity of the suspected offense was untenable because it would require difficult on-the-scene judgments about whether jail time was legally authorized.⁴⁰ Likewise, making the authority contingent on scofflaw or otherwise dangerous offenders was problematic.⁴¹ Citing speeding as one possible problem area, Justice Souter asked, "[I]s it not fair to expect that the chronic speeder will speed again despite a citation in his pocket . . . ?"⁴² Requiring police to divine whether behavior would persist would put them in an

³⁶ *Id.* at 345 (alteration in original) (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)).

³⁷ *Id.* at 346 (citing *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999) and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995)).

³⁸ In language echoing other recent opinions of the Court endorsing similar bright-line rules, Justice Souter characterized the need as follows:

Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Id. at 347.

³⁹ *Id.* at 347, 349 (quoting Brief of Petitioners at 46, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1299527).

⁴⁰ *Id.* at 348-49. Justice Souter elaborated: "It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, . . . but that the penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of arrest." *Id.* (internal citations omitted).

⁴¹ *Id.* at 349.

⁴² *Id.*

“almost impossible spot,” and “guarantee increased litigation over many of the arrests that would occur.”⁴³ In the end, Justice Souter concluded that having the constitutionality of an arrest hinge on such vicissitudes would create among police a “systemic disincentive to arrest”:

An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect’s risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of the trial. Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked.⁴⁴

Finally, Justice Souter questioned whether warrantless misdemeanor arrests ultimately “need constitutional attention.”⁴⁵ For one thing, he reasoned, the Court’s prior decisions establish that a magistrate must review all warrantless arrests within forty-eight hours to ensure that probable cause supports the detention.⁴⁶ Constitutional protection is also afforded, on a case-by-case basis, to guard against any arrest (whether felony or misdemeanor) that is “conducted in an extraordinary manner, unusually harmful to [the citizen’s] privacy or even physical interests.”⁴⁷ Furthermore, legislatures in several jurisdictions had expressly limited police authority to execute warrantless arrests for minor offenses, an alternative Justice Souter deemed preferable to a broad constitutional rule.⁴⁸ Statutory limits were

⁴³ *Id.* at 350. Justice Souter added:

It is no answer that the police routinely make judgments on grounds like risk of immediate repetition; they surely do and should. But there is a world of difference between making that judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest, and making the same judgment when the question is the lawfulness of the warrantless arrest itself.

Id.

⁴⁴ *Id.* at 351.

⁴⁵ *Id.* at 351-52.

⁴⁶ *Id.* at 352 (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 55-58 (1991)).

⁴⁷ *Id.* at 353 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)).

⁴⁸ *Id.* at 352. Justice Souter offered that such an approach is preferable because “the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle.” *Id.*

"natural" because it is in the interest of law enforcement "to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason."⁴⁹

Justice Souter concluded by expressing confidence that such statutory limits, "combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials," provided sufficient protection to citizens.⁵⁰ Indeed, the protection itself accounted for a "dearth of horrors demanding redress" in the form of "foolish, warrantless misdemeanor arrests."⁵¹ While acknowledging that such arrests likely occurred on occasion, Justice Souter expressed confidence that "surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."⁵² Moreover, any concern that police might utilize their expansive authority to arrest, in lieu of citation, and thereby arbitrarily harass citizens, was "speculative" insofar as the record failed to indicate that such a potential "has ever ripened into a reality."⁵³

In sum, the Court rejected Atwater's claim that her warrantless arrest and detention for a fine-only offense, as permitted by Texas statutory law,⁵⁴ violated the Fourth Amendment. The end result of *Atwater* is that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."⁵⁵ The sole limit is that the act of physical arrest itself cannot be carried out in an "extraordinary manner, unusually harmful to [the citizen's] privacy or . . . physical interests."⁵⁶

⁴⁹ *Id.*

⁵⁰ *Id.* at 353.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 354 & n.25.

⁵⁴ See TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 2005) (providing that a "peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view"); TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999) (providing that a "peace officer may arrest without a warrant a person found committing a violation").

⁵⁵ *Atwater*, 532 U.S. at 354.

⁵⁶ *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)).

Dissenting, Justice O'Connor, joined by Justices Ginsburg, Breyer, and Stevens, criticized the majority for affording "constitutional carte blanche" to officers to arrest for any offense, no matter how insignificant, solely on the basis of probable cause.⁵⁷ Justice O'Connor noted that the common law and historical record on minor-offense warrantless arrest authority was somewhat ambiguous,⁵⁸ but emphasized that prior statements by members of the Court gainsaid such authority.⁵⁹ Moreover, while the Court twenty-five years before in *Watson v. United States* had held that public warrantless arrests for felonies were justified solely on the basis of probable cause, there the historical record was far clearer and the state interest in immediate arrest far greater.⁶⁰ Finally, while the Court's 1996 decision in *Whren v. United States* approved of probable cause-based warrantless stops of motorists regardless of the subjective (perhaps pretextual) motivation of police, Atwater had been subject to a full custodial arrest.⁶¹ "Justifying a full [custodial] arrest by the same quantum of evidence that justifies a traffic stop—even though the offender cannot ultimately be imprisoned for her conduct—defies any sense of proportionality and is in serious

⁵⁷ *Id.* at 366 (O'Connor, J., dissenting).

⁵⁸ *Id.* at 362-63 (stating that the "Court's thorough exegesis makes it abundantly clear that warrantless misdemeanor arrests were not the subject of a clear and consistently applied rule at common law"). To scholars, most notably Professor Tom Davies, the framing era record is not so ambiguous, quite clearly evincing the limited warrantless arrest authority of law enforcement. See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002).

⁵⁹ *Atwater*, 532 U.S. at 362 (O'Connor, J., dissenting) (citing *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring)); *United States v. Robinson*, 414 U.S. 218, 238 n.2 (1973) (Powell, J., concurring)). The majority's exclusive probable cause-based standard also conflicted with several of the Court's prior decisions linking the reasonableness of police seizures to the gravity of the offense involved. See, e.g., *Illinois v. McArthur*, 531 U.S. 326, 336 (2001) (upholding seizure of resident because offense was "jailable"); *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (invalidating in-home warrantless arrest because offense was "nonjailable").

⁶⁰ *Atwater*, 532 U.S. at 362 (O'Connor, J., dissenting) (citing *Watson v. United States*, 423 U.S. 411 (1976)).

⁶¹ *Id.* at 363 (noting that "[t]here are significant qualitative differences between a traffic stop and a full custodial arrest.").

tension with the Fourth Amendment's proscription of unreasonable seizures."⁶²

Given the perceived ambiguous nature of the historical and precedential record, Justice O'Connor then engaged in balancing analysis, much like the majority. Rather than deferring to the avowed administrative benefits of a bright-line rule in evaluating reasonableness, however, Justice O'Connor expressed alarm over the ramifications of affording police unfettered discretionary authority to arrest for minor offenses. She first catalogued the major personal consequences of custodial arrests, including detention in a holding facility for up to forty-eight hours without judicial certification that the arrest was supported by probable cause;⁶³ the embarrassment and potential danger attending detention;⁶⁴ and the social stigma associated with having an arrest record.⁶⁵ She then highlighted the range of critically important investigatory powers tied to the occurrence of lawful arrests, such as the automatic right to search of the body and possessions of arrestees,⁶⁶ and the passenger compartment and any containers therein if the arrestee is driving a car.⁶⁷

In order to justify such a "severe intrusion on an individual's liberty," Justice O'Connor reasoned, the governmental need must be substantial.⁶⁸ However, in the context of fine-only offenses, this need was manifestly modest and sufficiently served by the less onerous alternative of a citation. Given the availability of citations, Justice O'Connor reasoned, it betrayed reasonableness to endorse a bright-line rule that "deems a full custodial arrest to be reasonable in every circumstance" solely because the officer had probable cause to believe that a violation occurred.⁶⁹ Such an approach defied the Fourth Amendment

⁶² *Id.* at 364.

⁶³ *Id.* (citing *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)).

⁶⁴ *Id.* (citing Rosazza & Cook, *Jail Intake: Managing a Critical Function-Part One: Resources*, 13 AM. JAILS 35 (Mar./Apr. 1999)).

⁶⁵ *Atwater*, 532 U.S. at 364-65 (O'Connor, J., dissenting) (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

⁶⁶ *Id.* at 364 (citing *United States v. Robinson*, 414 U.S. 218 (1973)).

⁶⁷ *Id.* (citing *New York v. Belton*, 453 U.S. 454 (1981)).

⁶⁸ *Id.* at 365.

⁶⁹ *Id.*

requirement that a police action be a “reasonable and proportional response to the circumstances of the offense,” instead giving police “unfettered discretion” to execute custodial arrests “without articulating a single reason why such action is appropriate.”⁷⁰

In place of the majority’s bright-line rule, Justice O’Connor advocated a case-by-case constitutional analysis modeled on *Terry v. Ohio*: when an officer has probable cause to believe that a fine-only offense has been committed, the officer “should issue a citation unless the officer is ‘able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion’ of a full custodial arrest.”⁷¹ To Justice O’Connor, such a rule would be only modestly less clear and bright than that imposed by the majority, in that it would merely require “a legitimate reason for the decision to escalate the seizure into a full scale custodial arrest.”⁷² Furthermore, whatever the option lacked in categorical quality and administrability, it compensated for “in fidelity to the Fourth Amendment’s command of reasonableness and sensitivity to the competing values protected by that Amendment.”⁷³ As for the majority’s concern over purported “systematic disincentives” associated with potential civil rights actions for false arrest, Justice O’Connor observed that qualified immunity largely served to insulate against the threat of actionable civil rights claims, and, at any rate, to the extent arrest disincentives were operative, they did not free the Court to “ignore the central [reasonableness] command of the Fourth Amendment.”⁷⁴

Applying her *Terry*-based test, Justice O’Connor concluded that neither “law nor reason” supported Turek’s decision to arrest Atwater.⁷⁵ Atwater, a mother of two who had lived in the area for sixteen years, and whose only previous violation—failing to signal a lane change while driving—occurred ten years

⁷⁰ *Atwater*, 532 U.S. at 372 (O’Connor, J., dissenting).

⁷¹ *Id.* at 366 (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 368.

⁷⁵ *Id.*

earlier, immediately accepted responsibility and apologized to Turek for her misbehavior.⁷⁶ It was thus likely that she thereafter would have complied with the seat belt law, and be available for a court appearance if necessary, making a citation a tenable and less restrictive option.⁷⁷ Justice O'Connor further noted that custodial arrest also failed to serve the interests of Atwater's two young children.⁷⁸ Turek's decision to arrest Atwater traumatized the children, leaving them distraught and fearful of police.⁷⁹ Instead of serving as a lesson in legal responsibility, as would be achieved by a citation, the arrest "taught the children an entirely different lesson: that the bad person could just as easily be the policeman as it could be the most horrible person they could imagine."⁸⁰ Justice O'Connor added that Turek's actions were "disproportionate" to Atwater's wrongdoing and that "[t]he majority's assessment that 'Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case,' is quite correct. In my view, the Fourth Amendment inquiry ends there."⁸¹

Finally, Justice O'Connor turned her sights to the broader implications of the majority's bright-line rule. While governments surely should be free to enact public welfare-related laws punishable only by fine,⁸² providing police categorical authority to arrest for their violation carried "grave potential for abuse," particularly because the Court's prior decision in *Whren v. United States* rendered constitutionally irrelevant the subjective motivations of police.⁸³ "After [the majority's decision]," O'Connor observed, "the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest."⁸⁴ To Justice O'Connor, precisely because the subjective motivations of police cannot now be considered, the Court must

⁷⁶ *Id.* at 369-70.

⁷⁷ *Id.* at 370.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (internal quotations omitted).

⁸¹ *Id.* at 371 (quoting *Atwater*, 532 U.S. at 347 (majority opinion)).

⁸² *Id.* at 371-72.

⁸³ *Id.* at 372 (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

⁸⁴ *Id.*

“vigilantly ensure” that police behaviors—“which are properly within our reach—comport with the Fourth Amendment’s guarantee of reasonableness.”⁸⁵

II. THE “EPIDEMIC”

Before considering the jurisprudential and practical effects of *Atwater*, it is important to discuss two empirical matters that undergird the majority’s decision and were rightly disputed by Justice O’Connor. First, the majority downplayed the need for constitutional regulation of warrantless arrest authority out of a belief that police naturally lack incentive to arrest for minor violations because they “carry costs too great to incur without good reason.”⁸⁶ As Justice O’Connor suggested, however, the majority’s sense of police motivation was at best naïve.⁸⁷ Because arrests serve as triggering events justifying an array of attendant police powers, most notably searches incident to arrest,⁸⁸ police have strong incentive to arrest for minor offenses in the hope of securing evidence of more serious crimes (typically, illegal drug or weapon possession).

Second, the majority insisted that constitutional oversight was not needed because the nation was “not confronting anything like an epidemic of unnecessary minor-offense arrests.”⁸⁹ In support, the majority pointed out that *Atwater*’s counsel at oral argument was able to identify only one other instance “of comparably foolish, warrantless misdemeanor arrests,”⁹⁰ serving to confirm that “there simply is no evidence of widespread abuse of minor-offense arrest authority,” and that counsel’s posited “potential for abuse” had not “ripened into a reality.”⁹¹

Again, Justice O’Connor justly disputed the majority’s assertions. As a threshold matter, she questioned the majority’s fixation on the purported “relatively small number of published

⁸⁵ *Id.*

⁸⁶ *Id.* at 321 (majority opinion).

⁸⁷ *Id.* at 372 (O’Connor, J., dissenting).

⁸⁸ *Atwater*, 532 U.S. at 353 (majority opinion).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 372 (O’Connor, J., dissenting).

cases,” noting that it “proves little and should provide little solace.”⁹² It has long been known that paucity of published (and for that matter unpublished) case law is a poor barometer of the actual existence of events.⁹³ This is perhaps especially so with street-level searches and seizures based on minor offenses, a context particularly conducive to “invisible” practices,⁹⁴ due to the effort and expense associated with constitutional litigation⁹⁵ and the natural disincentive to pursue a claim when no long-term deprivation of liberty is at stake.⁹⁶ Moreover, minor-offense arrest data, as noted by Atwater’s counsel in an unsuccessful petition for rehearing, very likely significantly underestimate the frequency of such arrests, for two chief reasons.⁹⁷ First, minor offense arrests are often not recorded as such if a search, conditioned upon the arrest, resulted in discovery of contraband or evidence of a more serious crime.⁹⁸ Second, the data fail to reflect instances when police “unarrest” individuals—that is,

⁹² *Id.*

⁹³ *Id.* For an early yet still apt recognition of this, see *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (noting that “invasion of the personal liberty of the innocent too often finds no practical redress,” and that “[t]here may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating...”). See also, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 121 (1980) (Marshall, J., dissenting) (“Because we are called on to decide whether evidence should be excluded only when a search has been ‘successful,’ it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty. I continue to believe that ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society.”).

⁹⁴ See, e.g., Caleb Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 20-21 (1957); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359-62 (1936).

⁹⁵ Gail Atwater qualified as a notable exception in this regard. She sued solely to vindicate what she saw as her Fourth Amendment right, not to suppress evidence uncovered by police in a search incident to arrest. Atwater and her husband, a physician, sold their home and incurred legal costs in excess of \$100,000. Atwater told one reporter: “If someone like me, a soccer mom, can be humiliated and handcuffed in front of her children, what happens to the poor migrant worker or minority when they’re stopped?” Milloy, *supra* note 13, at A9.

⁹⁶ See *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (noting that “invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating . . .”).

⁹⁷ Petition for Rehearing at 4-5, *Atwater*, 532 U.S. 318 (No. 99-1408) (providing data on traffic-related arrests in several states).

⁹⁸ *Id.*

police conduct a search ostensibly based on an arrest for a minor offense, find no evidence or contraband resulting in a more serious prosecution, and release an individual with a mere citation or warning.⁹⁹

In any event, even if one were to accept the majority's curious notion that a constitutional violation is acceptable merely because it rarely occurs,¹⁰⁰ the majority's empirical premise was clearly incorrect. Ample evidence existed at the time of *Atwater* of a profusion of "very minor offense" arrests, triggering incident searches resulting in more serious criminal prosecutions. For instance, state and lower federal courts condoned warrantless arrests, and searches incident thereto, for myriad minor auto and non-auto-related offenses, including:

illegal parking;¹⁰¹ littering;¹⁰² riding a bicycle on a sidewalk¹⁰³ or without a headlight;¹⁰⁴ civil contempt (based on a civil bench warrant);¹⁰⁵ juvenile curfew violation;¹⁰⁶ truancy;¹⁰⁷ speeding;¹⁰⁸ driving with a broken taillight;¹⁰⁹ possessing drug paraphernalia;¹¹⁰ violating an alcohol open container law;¹¹¹ public drinking;¹¹² underage possession of alcohol;¹¹³ "pedestrian interfe-

⁹⁹ *Id.*

¹⁰⁰ Indeed, the rarity of minor offense arrests, if accurate, itself can be said to heighten their Fourth Amendment unreasonableness. *Cf. Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (citing paucity of jury death verdicts imposed on defendants convicted of rape as evidence supporting the view that the death penalty in such situations violates the Eighth Amendment).

¹⁰¹ *Williams v. State*, 726 S.W.2d 99 (Tex. Crim. App. 1986).

¹⁰² *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999); *State v. Sparks*, 422 S.E.2d 293 (Ga. Ct. App. 1992); *State v. Ranson*, 511 N.W.2d 97 (Neb. 1994); *People v. Whitted*, 718 N.Y.S.2d 162 (City Ct. 2000).

¹⁰³ *United States v. McFadden*, 238 F.3d 198 (2d Cir. 2001) (applying New York law).

¹⁰⁴ *United States v. Bell*, 54 F.3d 502 (8th Cir. 1995) (applying Iowa law).

¹⁰⁵ *People v. Allibalogun*, 727 N.E.2d 633 (Ill. App. Ct. 2000).

¹⁰⁶ *In re Charles C.*, 90 Cal. Rptr. 2d 430 (Ct. App. 1999); *In re J.M.*, 995 S.W.2d 838 (Tex. App. 1999).

¹⁰⁷ *In re Humberto O.*, 95 Cal. Rptr. 2d 248 (Ct. App. 2000); *State ex rel. R.D.*, 749 So. 2d 802 (La. Ct. App. 1999).

¹⁰⁸ *United States v. Lugo*, 170 F.3d 996 (10th Cir. 1999) (applying Utah law); *Kearse v. State*, 986 S.W.2d 423 (Ark. Ct. App. 1999).

¹⁰⁹ *State v. Hehman*, 544 P.2d 1257 (Wash. Ct. App. 1976).

¹¹⁰ *State v. Thompson*, 104 Wash. App. 1008 (Wash. Ct. App. 2001).

¹¹¹ *People v. Pantusco*, 484 N.Y.S.2d 321 (App. Div. 1985); *State v. Pallone*, 613 N.W.2d 568 (Wis. 2000).

¹¹² *State v. Thompson*, 536 So. 2d 388 (Fla. Dist. Ct. App. 1989).

rence";¹¹⁴ urinating in public;¹¹⁵ and possessing a suspended driver's license while operating a bicycle (on reasoning that the document permitted misidentification).¹¹⁶

Since *Atwater*, courts have cited the majority's decision to uphold arrests (and incidental searches) for a litany of minor offenses, again very often based on municipal ordinances,¹¹⁷ including:

walking in a roadway;¹¹⁸ possessing an open container of alcohol in public;¹¹⁹ driving with an expired vehicle registration sticker;¹²⁰ making an illegal turn while driving;¹²¹ jaywalking;¹²² driving a car with a non-working headlight;¹²³ driving a car with a hole in the car's license plate;¹²⁴ riding a bicycle the wrong direction on a residential street¹²⁵ or without a headlight;¹²⁶ public urination;¹²⁷ driving a bike against traffic;¹²⁸

¹¹³ Commonwealth v. Moscat, 731 N.E.2d 544 (Mass. App. Ct. 2000).

¹¹⁴ State v. Greene, 983 P.2d 1190 (Wash. Ct. App. 1999).

¹¹⁵ Commonwealth v. Williams, 568 A.2d 1281 (Pa. Super. Ct. 1990); McConnell v. State, No. 14-99-00887-CR, 2001 WL 8344 (Tex. App. Jan. 4, 2001).

¹¹⁶ Caraballo v. State, 753 So. 2d 695 (Fla. Dist. Ct. App. 2000). For examples of pre-*Atwater* judicial invalidation of warrantless minor offense arrests, as constitutionally unreasonable, see Barnett v. United States, 525 A.2d 197 (D.C. 1987) (jaywalking); Thomas v. State, 614 So. 2d 468 (Fla. 1993) (riding a bicycle without a bell); State v. Carver, 577 N.W.2d 245 (Minn. Ct. App. 1998) (speeding).

¹¹⁷ For a discussion of the significant power of municipal governments to enact laws enforceable by state, local and federal officers, see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

¹¹⁸ Collins v. State, No. 14-00-00814-CR, 2001 WL 664644 (Tex. Ct. App. June 14, 2001).

¹¹⁹ People v. Lopez, No. HO24173, 2003 WL 21942954 (Cal. Ct. App. Aug. 14, 2003); State v. Roche, 928 So. 2d 761 (La. Ct. App. 2006).

¹²⁰ Nicholson v. State, No. 05-00-01401-CR, 2001 WL 515919 (Tex. Ct. App. May 16, 2001).

¹²¹ People v. Fennell, No. B144396, 2001 WL 1190768 (Cal. Ct. App. Oct. 1, 2001).

¹²² United States v. Pratt, 355 F.3d 1119 (8th Cir. 2004) (applying Missouri law); State v. Barros, 48 P.3d 584 (Haw. 2002); State v. Brown, No. 18972, 2001 WL 1657828 (Ohio Ct. App. Dec. 28, 2001).

¹²³ State v. Wilkenson, 769 N.E.2d 430 (Ohio Ct. Com. Pl. 2001).

¹²⁴ People v. Lambert, No. D052435, 2009 WL 1091704 (Cal. Ct. App. 2009).

¹²⁵ People v. McKay, 41 P.3d 59 (Cal. 2002).

¹²⁶ Brown v. State, No. 13-05-243-CR, 2006 WL 2025145 (Tex. App., July 20, 2006).

¹²⁷ State v. Mercante, 836 So. 2d 596 (La. Ct. App. 2002).

¹²⁸ People v. Bybee, No. B171855, 2004 WL 1689782 (Cal. Ct. App. July 29, 2004).

and violating a city ordinance for remaining in a public park after hours.¹²⁹

At the same time, courts have invoked *Atwater* to bar civil rights actions based on arrests for very minor offenses, without searches, as condoned in *Atwater*,¹³⁰ which in conjunction with data showing that most misdemeanor arrests do not result in prosecution,¹³¹ raises serious question whether police rarely resort to “unnecessary” minor offense arrests.

The judicial and empirical record thus readily contradicts the presumption that afforded constitutional solace to the *Atwater* majority. In a case decided shortly after *Atwater* in the 2000-2001 Term, involving a car inventory stemming from an arrest for several minor vehicle-related offenses, Justice O'Connor and the three other *Atwater* dissenters concurred on

¹²⁹ Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) (applying New Mexico law); Hudson v. State, No. CACR00-1013, 2001 WL 541069 (Ark. Ct. App. May 23, 2001).

¹³⁰ See, e.g., Thomas v. City of Peoria, 580 F.3d 633 (7th Cir. 2009) (unpaid parking tickets); Lorenzo v. City of Tampa, 259 Fed. App'x 239 (11th Cir. 2007) (illegally distributing handbills); Williams v. Rodriguez, 509 F.3d 392 (7th Cir. 2007) (double parking vehicle); Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) (being in a municipal park after closing); Chortek v. City of Milwaukee, 356 F.3d 740 (7th Cir. 2004) (illegally selling tickets); Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) (noise ordinance); Lowe v. Spears, No. 3:06-0647, 2009 WL 1393860 (S.D. W. Va. May 15, 2009) (parking violation); Revelly v. City of Huntington, No. 3:07-0648, 2009 WL 1097972 (S.D. W. Va. Apr. 23, 2009) (failure to stop a car parallel with a stop sign); Hitto v. City of Murphy, No. 4:08-cv-221, 2009 WL 801772 (E.D. Tex. Mar. 24, 2009) (running a stop sign while driving a bicycle); Shipp v. Bucher, No. 8:07-cv-440-T-17TBM, 2009 WL 179668 (M.D. Fla. Jan. 26, 2009) (public disposal of lighted material (cigarette)); Wasserman v. Rodacker, No. 06-1005 (RWR), 2007 WL 2071649 (D.D.C. July 18, 2007) (walking dogs without a leash); Sands v. City of New York, No. CV 04 5275 BMC CLP, 2006 WL 2850613 (E.D.N.Y. Oct. 3, 2006) (littering); Holloman v. City of Myrtle Beach, No. 4:04-1868, 2006 WL 4869353 (D.S.C. June 8, 2006) (following a police car too closely (1.5 lengths)); Bennett v. Booth, No. Civ. A. 3:04-1322, 2005 WL 2211371 (S.D. W. Va. Sept. 9, 2005) (unlawful display of a “Friends of Police” emblem on car).

¹³¹ See Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 46 (2000) (discussing data showing that majority of state misdemeanor arrests do not ultimately result in prosecution). Aggregate arrest data (while likely understated, for reasons noted) indicate the high frequency of arrests based on minor offenses. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbls. 4.1, 4.7 (Ann L. Pastore & Kathleen Maguire, eds., 2007), http://www.albany.edu/sourcebook/tost_4.html (noting millions of minor offense-based arrests, exclusive of non-DUI traffic violations); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 280-90 (2009) (examining huge volume of minor offense arrests in New York City).

stare decisis grounds,¹³² but expressed “hope” that the majority would reconsider its holding in *Atwater* “if experience demonstrates ‘anything like an epidemic of unnecessary minor-offense arrests.’”¹³³ Unfortunately, this reconsideration, based on what Justice Brandeis called the “lessons of experience,” has not been forthcoming.¹³⁴ As a result, with probable cause serving as the sine qua non of Fourth Amendment reasonableness, both visible and invisible arrests—and searches—have occurred without meaningful constitutional limit.¹³⁵ This expanded arrest power has major personal consequences for individuals, as noted by Justice O’Connor, and has assumed added significance with recent initiatives to extract and retain DNA samples from all arrestees, not solely from persons convicted of crimes.¹³⁶

Finally, Justice O’Connor’s insistence on the need for a constitutional limit, rather than relying on what the majority considered the lack of police incentive to arrest and the “good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials,”¹³⁷ has been validated by subsequent events. Faith that the political process can curb undue police practices, voiced again by the Court in *Herring v. United States*,¹³⁸ has proven unjustified.¹³⁹ Notably, in the wake

¹³² *Arkansas v. Sullivan*, 532 U.S. 769, 772-73 (2001) (applying Arkansas law).

¹³³ *Id.* at 773 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001)).

¹³⁴ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

¹³⁵ The Court’s recent decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009) holds some promise of mitigating the breadth of search incident to arrest authority, at least relative to auto-related stops. In *Gant*, the Court held that an auto interior search is justified only when “the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Id.* at 1723. The *Gant* majority stated that “[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.” *Id.* at 1719. The “reasonable basis to believe” standard, however, would appear to be a lesser quantum than probable cause, likely serving to limit the effect of the Court’s statement.

¹³⁶ See Solomon Moore, *F.B.I. and States Vastly Expanding Databases of DNA*, N.Y. TIMES, Apr. 19, 2009, at A1.

¹³⁷ *Atwater*, 532 U.S. at 353 (O’Connor, J., dissenting).

¹³⁸ 129 S. Ct. 695, 704 (2009). The Court’s view is strikingly reminiscent of that expressed in *Wolf v. Colorado*, 338 U.S. 25, 31 (1949), where Justice Frankfurter opined that “the internal discipline of the police, under the eyes of an alert public opinion” would obviate the need for a judicially imposed constitutional limit. However, the view

of *Atwater*, Texas itself considered enacting a statutory limit on the warrantless arrest authority of police with regard to minor motor vehicle offenses, emulating the laws in several jurisdictions approvingly cited by the majority.¹⁴⁰ However, the bill failed to secure gubernatorial approval.¹⁴¹ With the strong support of law enforcement groups, Governor Rick Perry stated that “[p]eace officers should retain their existing authority to use their discretion to arrest for a traffic violation.”¹⁴²

Moreover, the targets of such discretionary exercises of police authority will not only resemble self-described soccer moms such as Gail Atwater, who was very nearly relegated to the poor house as a result of her litigation.¹⁴³ Rather, what Justice O’Connor termed “constitutional carte blanche”¹⁴⁴ extends to all individuals suspected of committing minor offenses, a domain in which police enjoy maximum latitude to exercise discretionary arrest authority.¹⁴⁵ In this camp one will surely find the politically disempowered, disproportionately persons of color, whose voices are either muted or not heeded by elected officials, or quite possibly, out-of-state visitors whom the police can target with political impunity.¹⁴⁶

was gainsaid twelve years later in *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961), when the Court felt the need to impose the exclusionary sanction on the states.

¹³⁹ Cf. Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1329 (1998) (noting “breakdowns at the legislative and the discretionary institutional level that are mutually reinforcing”).

¹⁴⁰ *Atwater*, 532 U.S. at 352 (citing examples and noting that “[i]t is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution”).

¹⁴¹ Michele Deitch, *Veto Risks Texans’ Civil Rights*, DALLAS MORNING NEWS, July 1, 2001, at 5J.

¹⁴² Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 448 (2002) (citation omitted).

¹⁴³ See Milloy, *supra* note 13.

¹⁴⁴ *Atwater*, 532 U.S. at 366 (O’Connor, J., dissenting).

¹⁴⁵ See, e.g., James Walsh & Dan Browning, *Presumed Guilty Until Proved Innocent*, STARTRIBUNE (Minneapolis), July 23, 2000, at 1A (noting significantly higher warrantless arrest rates for African-Americans with regard to a broad array of minor offenses); see also David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1083 (1999) (“The problem with discretionary authority . . . is that discretion permits law enforcement to target those whose complaints are least likely to be heard by the rest of the community.”).

¹⁴⁶ Such a prospect was noted by Justice Stevens in *Knowles v. Iowa*, 525 U.S. 113 (1998), where the Court invalidated a police officer’s search incident to issuance of a citation. See Transcript of Oral Argument at 49, *Knowles v. Iowa*, 525 U.S. 113 (No. 97-

Justice O'Connor's insistence on a constitutional limit is further justified given the Court's recent decision in *Virginia v. Moore*.¹⁴⁷ Making ample use of *Atwater* as precedent, the *Moore* Court held that state statutory limits on police discretionary arrest authority for minor offenses were immaterial for Fourth Amendment purposes.¹⁴⁸ In *Moore*, police arrested a motorist in flagrant defiance of a Virginia law that limited custodial arrests to specified instances, such as when the violator refuses to discontinue the offense.¹⁴⁹ The arresting officer stated that executing an arrest instead of issuing a citation for driving with a suspended license was his "prerogative."¹⁵⁰ He thereafter conducted a search and discovered crack cocaine in Moore's vehicle, which ultimately led to Moore's conviction for possession of cocaine with intent to distribute.¹⁵¹ Invoking *Atwater's* "probable cause standard" and re-asserting the absence of any "epidemic" of "horribles" that compels redress, the *Moore* Court stated:

[A]n arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.¹⁵²

With *Moore*, the Court thus dashed the lingering hope of direct legislative redress for the exercise of unreasonable discretionary arrest authority of police, using *Atwater's* substitute of probable cause for reasonableness as constitutional justification.¹⁵³ As *Moore* and *Atwater* in tandem make clear, constitu-

7597), 1998 WL 781827 (observing that Iowa police might save the strategy of arresting rather than ticketing "for out-of-state motorists").

¹⁴⁷ 128 S. Ct. 1598 (2008).

¹⁴⁸ *Id.* at 1604-07; *see also id.* at 1609 (Ginsburg, J., concurring).

¹⁴⁹ *Id.* at 1602.

¹⁵⁰ Joint Appendix at 15, *Moore*, 128 S. Ct. 1598 (2007) (No. 06-1082).

¹⁵¹ *Moore*, 128 S. Ct. at 1602.

¹⁵² *Id.* at 1606.

¹⁵³ *See id.* at 1604 (noting that "when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. . . . The arrest is constitutionally reasonable."); *see also id.* at 1608 ("When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to

tional reasonableness turns solely on probable cause that a substantive law was violated, irrespective of whether a jurisdiction procedurally authorizes (*Atwater*) or prohibits (*Moore*) arrest for its violation. As a result, warrantless arrests for minor offenses have continued unabated.¹⁵⁴

Ultimately, the *Atwater* majority's understanding of both police motivation and the incidence of minor offense arrests stems from a basic confidence in the equitable use by police of their discretionary authority. As Ronald Dworkin once noted, however, "[d]iscretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."¹⁵⁵ With *Atwater*, this "belt," long supported by judicial sensitivity to police abuses of discretionary authority¹⁵⁶ and decades of research,¹⁵⁷ has essentially ceased to exist.

search the suspect in order to safeguard evidence and ensure their own safety."). *Atwater*—decided in 2001—served as the anchor of the *Moore* Court's reference to the "long line" of cases equating probable cause with constitutional reasonableness, the historical verity of which was justly questioned by Justice Ginsburg in her *Moore* concurrence. *Moore*, 128 S. Ct. at 1608-09 (Ginsburg, J., concurring).

¹⁵⁴ In the future, such arrests may not be limited to non-breach-of-the-peace offenses occurring "in the presence" of arresting officers. The *Atwater* majority expressly disclaimed the need to address whether the accepted common law requirement enjoyed constitutional status, seeing no need to "speculate" on the question, presumably because Turek witnessed *Atwater*'s seatbelt violation. *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001). However, the majority signaled its view that the requirement is not of Fourth Amendment stature, citing to a prior comment to this effect by Justice White. *Id.* (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting)).

¹⁵⁵ RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 31 (1977).

¹⁵⁶ Such concern was perhaps most famously evinced by Justice Robert Jackson's assertion that search and seizure authority should not be left only to "the officer engaged in the often competitive enterprise of ferreting out crime." *United States v. Johnson*, 333 U.S. 10, 14 (1948). For similar acknowledgements in later years see, for example, *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *Chapman v. United States*, 365 U.S. 610, 614 (1961). See also Herbert L. Packer, *The Courts, The Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 241 (1966) (observing that the judiciary was "unconvinced that the police regard the rights of the accused as anything but a nuisance and an impediment").

¹⁵⁷ See, e.g., WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (Frank J. Remington ed., 1965); see also ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880*, at 180-81 (1989) (quoting a local city judge, alarmed at the increasing resort by police to arrest for minor offenses, who demanded that they cease their "constant habit of arresting parties in order to search them.").

III. THE PERILS OF POSITIVIST POLICING

By equating probable cause with constitutional reasonableness, Justice O'Connor correctly observed, the *Atwater* majority freed police to invoke minor offenses as bases for arrest, permitting the widespread "pointless indignity" suffered by lawbreakers such as Gail Atwater¹⁵⁸ and the "grave potential for abuse" associated with unfettered discretionary arrest authority.¹⁵⁹ The myriad of substantive offenses today codified in state, federal, and local government codes, have become, in the wake of *Atwater*, tools for the exercise of discretionary police arrest authority. The Court itself has refused to regulate these tools, eschewing imposition of limits on possibly "exorbitant codes"¹⁶⁰ for purposes of police enforcement, and rejecting, as *Virginia v. Moore* established, any federal constitutional limiting effect of cognate state procedural limits on police arrest authority.¹⁶¹

Because police officers take oaths to enforce the law, the Court's insistence that their arrest authority be based on a suspected violation of positive law should come as no surprise. Indeed, as Justice O'Connor emphasized, governments clearly act within their rights when they legislate pursuant to their police power authority, including *malum prohibitum* offenses.¹⁶² However, as she also noted, not all laws should be the same relative to police discretionary arrest authority. This part examines several important consequences of the *Atwater* majority's decision to make constitutional reasonableness turn on probable cause that an offense, no matter how menial, has occurred.

¹⁵⁸ *Atwater*, 532 U.S. at 371 (O'Connor, J., dissenting).

¹⁵⁹ *Id.* at 372.

¹⁶⁰ *Whren v. United States*, 517 U.S. 806, 818 (1996). *See also* Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2651 (2009) (Thomas, J., dissenting) (specifying a "basic principle of the Fourth Amendment: that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules") (citing *Atwater*, 532 U.S. at 347).

¹⁶¹ *See supra* notes 147-154 and accompanying text. For discussion of the risks associated with decoupling substantive laws from their accompanying procedural limits, see Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 74-75 (2006).

¹⁶² *Atwater*, 532 U.S. at 371-72 (O'Connor, J., dissenting).

A. "Law in the Air"¹⁶³

The Texas law at issue in *Atwater*, penalizing a motorist's failure to wear a seat belt—resulting in a fine—is representative of countless state, local, and federal laws targeting similar misconduct of a relatively non-serious nature.¹⁶⁴ In *Atwater*, only a single law was implicated. Three years later, in *Devenpeck v. Alford*,¹⁶⁵ the Court made clear that the greater the number of laws potentially at play, the greater the likelihood that an arrest will be deemed constitutionally valid.

In *Alford*, police arrested an individual because he was believed to be tape recording a traffic stop in violation of state privacy laws. After a determination that Alford's behavior was in actuality not illegal, the charges against him were dismissed.¹⁶⁶ Thereafter, prosecutors filed new legally actionable charges, based on the arresting officer's subsequent contention that probable cause existed at the time to support arrest for other offenses not initially identified by the arresting officer (e.g., impersonating a police officer).¹⁶⁷ The Court unanimously held the new grounds of arrest were constitutionally reasonable, even though not "closely related" to the alleged misconduct serving as the initial basis for arrest.¹⁶⁸ Probable cause that a legal violation occurred, "drawn from the facts known to the arresting officer," even if based on *ex post* legal extrapolations of the entire legal code, can thus constitutionally validate an arrest.¹⁶⁹ An officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."¹⁷⁰ So long as probable cause exists that *some* offense occurred, an arrest is constitutionally reasonable, even if the legal

¹⁶³ With a hat tip of course to Justice Cardozo who alternatively argued that "negligence in the air," absent proof of violation of a legal norm, will not suffice to create tort liability. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.).

¹⁶⁴ See *supra* notes 101-130 and accompanying text.

¹⁶⁵ 543 U.S. 146 (2004).

¹⁶⁶ *Id.* at 149-51.

¹⁶⁷ *Id.* at 149-50.

¹⁶⁸ *Id.* at 155-56.

¹⁶⁹ *Id.* at 152. The court added, "[T]hose are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." *Id.* at 155.

¹⁷⁰ *Id.* at 153.

basis is not specified, or indeed, if the basis initially specified turns out to lack legal justification.

Atwater and *Alford*,¹⁷¹ together with *Moore*'s disregard of procedural limits on police arrest authority, have empowered police to use any law, at any time, and any place,¹⁷² to justify arrests, and hence searches.¹⁷³ Given the heavily regulated nature of modern society, especially relative to motor vehicles,¹⁷⁴

¹⁷¹ For examples of recent decisions expressly combining *Alford* and *Atwater*, see *Brown v. Fisher*, 251 Fed. App'x. 527 (10th Cir. 2007) (applying Kansas law); *Apodca v. City of Albuquerque*, 443 F.3d 1286 (10th Cir. 2006) (applying New Mexico law); *Tatum v. City of San Francisco*, 441 F.3d 1090 (9th Cir. 2006) (applying California law); *United States v. McNeill*, 484 F.3d 301 (4th Cir. 2007) (applying Maryland law). For examples of earlier courts deploying *Atwater* to reach results later also authorized by *Alford*, see *Williams v. Jaglowski*, 269 F.3d 778 (7th Cir. 2001) (applying Illinois law); *People v. Bybee*, No. B171855, 2004 WL 1689782 (Cal. Ct. App. July 29, 2004).

It warrants mention that *Alford* potentially builds on language in *United States v. Leon*, 468 U.S. 897 (1984), which suggested that information possessed by other officers can augment and rehabilitate infirm probable cause assessments by arresting officers. See *id.* at 923 n.24 ("References to 'officer' throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination."); see also *Whitely v. Warden*, 401 U.S. 560 (1971) (recognizing the "collective knowledge" doctrine).

¹⁷² See, e.g., *United States v. Turner*, 553 F.3d 1337, 1345-46 (10th Cir. 2009) (applying Colorado law and, citing *Atwater* and *Moore*, holding that jurisdictional geographic limits on police arrest authority have no bearing on constitutionality of arrest).

¹⁷³ The Court's recent decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), presents an interesting question vis-à-vis *Alford*. As noted earlier, the Court imposed new limits on police search incident to arrest authority, deeming an automobile search justified only when "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 1723 (emphasis added). *Alford*'s bearing on the latter consideration remains to be seen when, for example, the initial basis for arrest leads an officer to reasonably believe the car contains relevant evidence, but the substantive legal basis for the arrest itself (as in *Alford*) is later deemed invalid.

¹⁷⁴ See Wayne R. LaFare, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1853 (2004) (noting that "very few drivers can traverse any appreciable distance without violating some traffic regulation"). *Atwater*'s application in the auto context, as Professor Dave Moran has astutely observed, can function to moot the Court's case law limiting police roadblocks. See David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 832 (2002) ("If an officer may stop any car she observes committing any traffic or equipment violation, arrest the motorist and search the car, there is no need to set up roadblocks. Indeed, it would obviously be much more efficient and productive for the police to single out 'suspicious' motorists, [and] stop and arrest them for trivial violations . . .").

the power is manifestly far greater than that enjoyed by framing era police.¹⁷⁵

B. "Could have Arrested" Authority

Atwater's positivist orientation has encouraged and fortified another feature of modern street-level policing: the "could have arrested" authority. The question of whether an actual arrest is necessary to justify an incidental search would appear to have been settled by several of the Court's prior decisions. In particular, in *Cupp v. Murphy*¹⁷⁶ the Court stated:

Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might likely be instead to be concerned with diverting attention away from himself.¹⁷⁷

Similarly, the Court's unanimous 1998 decision in *Knowles v. Iowa*, prohibiting police from conducting searches incident to issuance of a citation, was clearly predicated on the occurrence of an actual arrest.¹⁷⁸ Even though Iowa law expressly authorized arrest (as in *Atwater*) for a speeding offense, the fact that the officer did not arrest Knowles—but rather merely issued a citation—rendered the ensuing search unconstitutional.¹⁷⁹ Tak-

¹⁷⁵ As Professor Tom Davies has convincingly shown, during the framing era the *ex parte* warrantless arrest authority of police, such as it existed, was very limited. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). The limited authority stemmed *inter alia* from the requirement that an offense have been committed "in fact." *Id.* at 651. "[The] common law required that arrest or search warrants had to be based on an allegation of an offense or theft 'in fact' as well as 'probable cause of suspicion' as to a particular person to be arrested or place to be searched." *Id.* at 703; see also Davies, *supra* note 58, at 301-26.

¹⁷⁶ 412 U.S. 291 (1973).

¹⁷⁷ *Id.* at 296. The Court did, however, allow admission of incriminating evidence found pursuant to what it termed a "very limited search," one "necessary to preserve the highly evanescent evidence [police] found under [the suspect's] fingernails." *Id.*

¹⁷⁸ 525 U.S. 113 (1998).

¹⁷⁹ *Id.* at 118-19. Indeed, the Iowa Supreme Court's contrary decision below expressly relied on the "could have" approach, based on its prior decision in *State v. Doran*, 563 N.W.2d 620 (Iowa 1997). According to *Doran*, search-incident authority:

en together, *Cupp* and *Knowles*, along with the Court's several landmark search-incident cases, in which arrests indisputably occurred,¹⁸⁰ make clear that an actual arrest must occur before a search is authorized—not merely that probable cause to arrest existed.¹⁸¹

[I]s dependent upon facts that provide a legal basis for making a custodial arrest rather than the act of arrest itself. . . .

. . . .

. . . We have adopted an objective or "could" assessment of the arresting officer's conduct in making the arrest "so long as the officer is legally permitted and objectively authorized to do so, an arrest is constitutional."

. . . .

. . . If the officer is legally permitted and objectively authorized to make the arrest, he is, for that reason alone, also authorized to make the search.

Id. at 622-23 (citation omitted). Expressing a sentiment strikingly prescient of the ramifications of *Atwater* itself, Justice Neuman wrote in dissent:

It is, indeed, expedient . . . to enhance the power of police officers. . . . But the sweep of today's opinion will also sacrifice the personal privacy of "soccer moms" driving a little too fast to the ball field, senior citizens motoring along without a taillight, and otherwise "good kids" who fail to dim their high beams swiftly enough. All will be subject to search at the whim of the officer, not because they will be taken into custody, but because they could have been.

Id. at 624 (Neuman, J., dissenting).

¹⁸⁰ See, e.g., *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969). Furthermore, a basic assumption of search-incident doctrine is that a search is justified because of the incidence of an actual arrest. See *Belton*, 453 U.S. at 461 (stating that a "container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have"); *Robinson*, 414 U.S. at 235 (stating that an "arrest of a suspect . . . is a reasonable intrusion under the Fourth Amendment," and "that intrusion being lawful, a search incident to the arrest requires no additional justification").

¹⁸¹ As the Wisconsin Supreme Court has observed, the Court's decision in *United States v. Robinson*:

[M]ade clear that it is the fact of the lawful arrest which establishes the authority to undertake an extensive search for weapons and evidence of a crime. The actual making of a formal arrest, as opposed to the mere existence of grounds for doing so, is considered to be a significant event. The lawful arrest is not a mere formality, and without an arrest there is no justification for a full search incident to an arrest.

State v. Swanson, 475 N.W.2d 148, 154 (Wis. 1991) (citation omitted). See also *State v. Pallone*, 613 N.W.2d 568, 577 (Wis. 2000) ("For the search incident to arrest exception to apply, there must be an arrest The requirement of an arrest is a 'bright line rule'") (quoting *Knowles*, 525 U.S. at 113, 117-18 (1998)); HARVEY CORTLAND VORHEES, *THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS* § 209, at 173 (2d ed. 1915) (stating "an

Nevertheless, the case law contains numerous instances of state and lower federal courts endorsing the “could have arrested” doctrine. Before *Atwater*, this tendency was common enough,¹⁸² both raising constitutional concern and stunting development of the law of arrest.¹⁸³

Predictably, *Atwater*, with its probable cause-based constitutional standard, has fostered proliferation of the view,¹⁸⁴ even though probable cause is neither susceptible of precise understanding¹⁸⁵ nor hard to satisfy.¹⁸⁶ Courts have also used the ra-

officer has no right to search a person and seize anything upon him unless he has first arrested him”).

¹⁸² See, e.g., *United States v. Ricard*, 563 F.2d 45, 49 (2d Cir. 1977) (“[T]he fact that [the officer] had cause to arrest appellant for speeding, even if he initially determined not to do so, was a sufficient predicate for a full search.”); *Commonwealth v. Mantinez*, 692 N.E.2d 92, 96 (Mass. Ct. App. 1998) (“Probable cause for an arrest, even if not acted upon by a formal arrest, brings with it the ‘search incident to arrest’ exception to the warrant requirement for a search.”) (citing *Commonwealth v. Brillante*, 399 Mass. 152, 155 n. 6 (1987)); *State v. Roach*, 452 N.W.2d 262, 266 (Neb. 1990) (“It is not necessary that an actual formal arrest occur before a search is undertaken, as long as probable cause for arrest does exist”); *State v. Greenslit*, 559 A.2d 672, 674 (Vt. 1989) (“[I]t is the existence of probable cause for the arrest which brings the search within constitutional limits, not merely the act of taking the individual into custody.”).

¹⁸³ This underdevelopment stands in stark contrast to the rich jurisprudence concerning when a suspect is in “custody” for *Miranda* purposes and when a “de facto” arrest occurs (as opposed to a *Terry* stop) requiring probable cause. See Thomas K. Clancy, *The Supreme Court’s Search for a Definition of a Seizure: What is a “Seizure” of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1999) (discussing distinctions between de facto arrests and stops); Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 CHI.-KENT L. REV. 127, 138 n.76 (1991) (noting that “post-*Miranda* cases dwell on the definitions of custody and interrogation”). As a result, what Richard Uviller has called the “magical moment of arrest” has largely been mooted, disabling development of an important aspect of Fourth Amendment law. See H. RICHARD UVILLER, *VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA* 28 (1996). See also WAYNE R. LAFAVE, 3 *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 5.1, at 2 (4th ed. 2004) (noting that “[i]t is often important to determine whether or not the police have made an arrest and, if they have, precisely when the arrest occurred”).

¹⁸⁴ See, e.g., *United States v. Pratt*, 355 F.3d 1119, 1122-24 (8th Cir. 2004) (applying Missouri law and citing *Atwater* in support); *People v. Branner*, 92 Cal. Rptr. 3d 272, 276 (Cal. Ct. App. 2009) (citing *Atwater* in support).

¹⁸⁵ See *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (noting that probable cause is a “fluid” concept “not readily . . . reduced to a neat set of legal rules”); *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (noting difficulty in articulating “precisely what [probable cause] means”). In addition, of late the Court has haphazardly conflated probable cause with ostensibly lesser standards relating to reasonableness. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (stating that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt”).

tionale to justify otherwise impermissible delays in auto stops¹⁸⁷ because under *Atwater* police could have executed an arrest.¹⁸⁸ The persuasive appeal of the doctrine is so potent as to redeem searches when police have issued a citation before undertaking a search, an outcome contrary to *Knowles v. Iowa*,¹⁸⁹ again predicated on the argument that because police could have arrested they were entitled to search.¹⁹⁰

The upshot of the foregoing is that police, with probable cause to believe that a minor offense has occurred, yet having a mere hunch of greater wrongdoing, can argue with constitutional justification that they could have arrested an individual, even if they do not. They can then lawfully conduct a body (or auto) search, and, if nothing more incriminating is discovered, engage in the time-honored practice of setting the individual free with a citation or warning.¹⁹¹ Alternatively, in the absence of even a hunch of greater wrongdoing, police can arrest and search, and discover a basis justifying pursuit of a more serious prosecution, which itself too often pressures courts to indulgently assess already lax probable cause standards.¹⁹² Finally, police can poten-

¹⁸⁶ See, e.g., *Gates*, 462 U.S. at 238 (describing the standard as tantamount to a "fair probability"); *Valdez v. McPheters*, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999) (noting that "probable cause itself is a relatively low threshold of proof"). As Bill Stuntz recognized several years before *Atwater* was decided, "In a world where trivial crimes stay on the books, or one where routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997).

¹⁸⁷ See *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (requiring that police "diligently pursue[] a means of investigation that [is] likely to confirm or dispel their suspicions quickly").

¹⁸⁸ See, e.g., *United States v. Carpenter*, 406 F.3d 915, 916 (7th Cir. 2005) (applying federal law); *Wilkes v. State*, 774 A.2d 420, 438 (Md. 2001).

¹⁸⁹ 525 U.S. 113 (1998).

¹⁹⁰ *Carpenter*, 406 F.3d at 916-17.

¹⁹¹ See LAFAYE, *supra* note 157, at 186-88, 484-85 (noting widespread police "arrest and release" in the 1950s and 1960s); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359-62 (1936) (describing same practice during the first decades of the twentieth century).

¹⁹² See *State v. Overby*, 590 N.W.2d 703, 708 (N.D. 1999) (Vande Walle, C.J., concurring) (expressing concern that "with the expectation or hope that the search will produce such irrefutable evidence of the commission of a crime that a lack of probable cause to arrest prior to the search will be overlooked or such suspicion as did exist will be viewed more favorably in light of the evidence discovered in the search if, in fact, there is evidence discovered"); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 221 (1975) ("The illegality of a search is likely to be tempered—even in the eyes of the judiciary—by the

tially use *Atwater* to threaten arrest for a minor offense, presuming probable cause exists to support such an arrest, in order to secure “voluntary” consent to search,¹⁹³ which depending on the outcome of the search, can result in a more serious prosecution, or immediate freedom for the individual. Under any of these scenarios, Justice O’Connor’s prediction in *Atwater* of a “grave potential for abuse” comes to fruition.¹⁹⁴

C. “Mistakes” of Law

Atwater’s apotheosis of probable cause and substantive laws has also served to heighten the importance of the latitude afforded police in their misapprehension of the laws they invoke to justify arrests. Historically, of course, lack of knowledge or misunderstanding of criminal laws has been rejected as a basis for citizens to avoid criminal liability.¹⁹⁵ With respect to police, courts typically reject government arguments that an officer’s misapprehension of an invoked law can justify a seizure, on the view that enforcement of a non-existent legal standard itself is not objectively reasonable.¹⁹⁶ To find such a seizure justified would be to countenance a “failure to understand the law by the very person charged with enforcing it.”¹⁹⁷ Doing so, furthermore, “would remove the incentive for police to make certain that they

discovery of incriminating evidence on the suspect.”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) (“Judges do not like excluding bloody knives, so they distort doctrine, claiming that the Fourth Amendment was not really violated.”).

¹⁹³ See 3 LAFAVE, *supra* note 183, at § 8.2(c).

¹⁹⁴ *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O’Connor, J., dissenting).

¹⁹⁵ See OLIVER W. HOLMES, *THE COMMON LAW* 41 (Belknap Press, 1963):

It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit [legal mistakes] as an excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

For competing views surveying exceptions to the precept in modern case law, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998) (focusing on crimes that require willfulness *mens rea*); Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997) (focusing on *malum prohibitum* crimes).

¹⁹⁶ 4 LAFAVE, *supra* note 183, at § 9.5 (citing cases).

¹⁹⁷ *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005).

properly understand the law that they are entrusted to enforce and obey.”¹⁹⁸

This core understanding, however, has been eroded in recent years. Even though the law-fact distinction is not always clear-cut,¹⁹⁹ police are forgiven reasonable mistakes of fact, on which probable cause is based.²⁰⁰ Moreover, legal standards themselves often admit of substantial interpretive flexibility. For instance, whether a car is operated on the streets in “good mechanical condition” is a legally and factually loaded determination made by officers—a determination in which they enjoy considerable legal latitude.²⁰¹

In some courts, however, the line-drawing enterprise itself is of no moment. In the Eighth Circuit, for instance, officers are forgiven mistakes of law and fact alike. There, if an officer seizes an individual based on a mistaken understanding of the law she is enforcing, “the legal determination of whether probable cause or reasonable suspicion existed for the stop is judged by whether the mistake of law was an ‘objectively reasonable one.’”²⁰² The Eighth Circuit’s stance is shared by several states,

¹⁹⁸ *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000). *See also* *People v. Teresinski*, 605 P.2d 874, 877 (Cal. 1980) (asserting that a contrary rule “would provide a strong incentive to police officers to remain ignorant of the language of the laws and of the teachings of judicial decisions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct.”).

¹⁹⁹ *See generally* 6 LAFAVE, *supra* note 183, at § 11.7(c).

²⁰⁰ *See, e.g.*, *United States v. Booker*, 496 F.3d 717 (D.C. Cir. 2007); *United States v. Jenkins*, 452 F.3d 207 (2d Cir. 2006) (applying New York law); *United States v. Flores-Sandoval*, 366 F.3d 961 (8th Cir. 2004) (applying U.S. law). *See also* *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (“Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause”); *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990) (noting that factual determinations made by police need not “always be correct,” but they always must be “reasonable”); *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (“[T]he Court has also recognized the need to allow some latitude for honest [factual] mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.”).

²⁰¹ *See* *State v. Beauregard*, 820 A.2d 183, 183 (Vt. 2003). *See also, e.g.*, *United States v. Valdez*, 147 Fed. App’x. 591, 594 (6th Cir. 2005) (construing Tennessee law providing that a vehicle “shall not follow another vehicle more closely than is reasonable and prudent”).

²⁰² *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006) (citation omitted); *see also* *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005) (“[I]n our circuit, the distinction between a mistake of law and a mistake of fact is irrelevant to the fourth amendment inquiry. . . . [I]n mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one.”).

which also forgive objectively reasonable mistakes of law by police, that is, unlawful but not unreasonable arrests.²⁰³ Georgia goes even further, asking whether officers acted in good faith:

If the officer acting in good faith believes that an unlawful act has been committed, his actions are not rendered improper by a later legal determination that the defendant's actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute. It is not the officer's function to determine on the spot such matters as . . . the legal niceties in definition of a certain crime, for these are matters for the courts.²⁰⁴

Meanwhile, other courts have signaled their generosity in motions to suppress by emphasizing that officers are not to be held to the standard of a prospective lawyer "taking the bar exam,"²⁰⁵ and do not need to carry a "Decennial Digest" on the job.²⁰⁶ As the Ninth Circuit has observed, an officer need not "have a precise appreciation of the niceties of the law. If the facts are sufficient to lead an officer to reasonably believe that there was a violation, that will suffice, even if the officer is not certain about exactly what it takes to constitute a violation."²⁰⁷

Thus, unlike *Alford*, where a legal mistake was forgiven because there existed unspecified alternative legal bases to justify the arrest, in the cases just noted no valid legal basis existed to support Fourth Amendment seizures.²⁰⁸ Whether the Court's

²⁰³ See, e.g., *Harrison v. State*, 800 So. 2d 1134, 1138-39 (Miss. 2001); *State v. Greer*, 683 N.E.2d 82, 86 (Ohio Ct. App. 1996).

²⁰⁴ *McConnell v. State*, 374 S.E.2d 111, 113 (Ga. Ct. App. 1988). *McConnell's* focus on subjective good faith would appear to be on weak footing after *Whren*; to date, however, Georgia courts seemingly have not deviated from the position. See, e.g., *Dixon v. State*, 609 S.E.2d 148, 150-51 (Ga. Ct. App. 2005). But see *Cash v. State*, 593 N.E.2d 1267, 1269 (Ind. Ct. App. 1992) (holding that "simple good faith on the part of the arresting officer is not enough. If it were, 'the protection of the Fourth Amendment would evaporate.'" (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968))).

²⁰⁵ *United States v. Wallace*, 213 F.3d 1216, 1220 (9th Cir. 2000).

²⁰⁶ *Kelley v. Myler*, 149 F.3d 641, 647 (7th Cir. 1998) (quoting *Bodzin v. City of Dallas*, 768 F.2d 722, 725 (5th Cir. 1985)).

²⁰⁷ *United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002).

²⁰⁸ What the tendency means for civil rights actions sounding in false arrest and the right of citizens to resist unlawful arrests remains to be seen. See, e.g., *State v. Lindsay*, 388 So. 2d 781, 782 (La. 1980) ("It is a long-established principle in Louisiana law that a citizen has the right to resist an unlawful arrest."); *Riffe v. Armstrong*, 477 S.E.2d 535,

recent decision in *Herring v. United States*,²⁰⁹ making application of the exclusionary rule depend upon "deliberate" and "culpable" police errors,²¹⁰ will invigorate the tendency toward forgiving reasonable police mistakes remains to be seen.²¹¹ There is no mistaking, however, that the indulgence undercuts vagueness doctrine, with its foremost concern over arbitrary police enforcement,²¹² and qualifies as a highly troubling development in a society that prides itself on its dedication to the rule of law²¹³ and refuses to forgive similar citizen misunderstandings.²¹⁴ Not only do police now wield the power to act as de facto legislators, based on their discretionary authority to invoke (or nor invoke) extant laws, as Bill Stuntz has noted.²¹⁵ They also have the concomitant power to detain individuals for behavior never even legislatively proscribed.

549 (W. Va. 1996) (noting that false arrest claim must be supported by proof of no legal authority to arrest).

²⁰⁹ 129 S. Ct. 695 (2009).

²¹⁰ See *id.* at 702 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").

²¹¹ Of course, attenuation doctrine further dilutes police incentive to master the substance of the laws they are expected to enforce. For instance, if voluntary consent to search is secured, such consent can cure a legally invalid stop or arrest, barring application of the exclusionary rule and allowing admission of any evidence or contraband obtained by the search. See *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

²¹² See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 360-61 (1983). On this connection more generally see Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398 (2001).

Importantly, in light of the judicial tendency to forgive police legal mistakes, legislative efforts to codify more detailed laws in order to limit police discretion and guard against successful vagueness challenges can have the opposite effect of facilitating indulgence of police mistakes of law. This is because the more intricate laws become, the greater the latitude police will be afforded for their legal mistakes. Cf. Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1525-26 (2007) (noting that efforts to make laws more specific have not appreciably lessened the discretionary authority of police).

²¹³ See generally RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2001). Cf. *THE DECLARATION OF INDEPENDENCE* para. 21 (U.S. 1776) (condemning use by British Crown of "pretended offences" to harass colonists); FRANZ KAFKA, *THE TRIAL* 3 (Willa Muir & Edwin Muir trans., Random House 1956) (1925) ("Someone must have traduced Joseph K., for without having done anything wrong he was arrested one fine morning.").

²¹⁴ See *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (recognizing "the fundamental unfairness of holding citizens to 'the traditional rule that ignorance of the law is no excuse,' while allowing those 'entrusted to enforce' the law to be ignorant of it.") (citations omitted).

²¹⁵ William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 24 (1996).

CONCLUSION

Justice O'Connor's dissent in *Atwater v. City of Lago Vista* is notable both for its steadfast fidelity to Fourth Amendment reasonableness and its astute recognition of the personal and jurisprudential consequences of its abandonment. Wise at its time of issuance, moreover, the dissent has proved prescient. Rather than being merely "speculative," the "dearth of horrors" posited by the *Atwater* majority was and remains an empirical reality, predictably inspiring other troublesome practices, as outlined above. Stepping back, one can only hope that Justice O'Connor's dissent, like other great dissents, "may salvage for tomorrow the principle that was sacrificed or forgotten today."²¹⁶

²¹⁶ William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 JUDICATURE 104, 107 (1948). See also CHARLES EVAN HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928) ("A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

BRANDEIS IN *OLMSTEAD*: “OUR GOVERNMENT IS THE POTENT, THE OMNIPRESENT TEACHER”¹

Carol S. Steiker*

Greatness, of course, lies in the eye of the beholder. A large part of what makes us revere a judicial dissent as “great” is our current conviction that the dissenter was “right” in some important way. At the most particular level, a dissenter could be right about a specific legal point. At a level of greater generality (and therefore of greater “greatness”), a dissenter could be right about a whole area of law or an interpretive approach that the dissenter brings to bear. At the most general (and therefore “greatest”) level, a dissenter could be right not only about law or legal methodology, but also about something even bigger—a vision of constitutionalism, democracy, or the human condition.

Justice Louis Brandeis’s dissent in *Olmstead v. United States*² from the Taft Court’s decision to exempt governmental wiretapping from constitutional regulation is a natural choice for the category of “great dissents” because there is widespread consensus about its greatness. Such a consensus could also make it a boring choice because there is nothing very interesting about telling people something they think they already know. However, the consensus appears to be that Brandeis’s *Olmstead* dissent is great in the first two senses previously described—its vindication on the issue of the constitutional status of wiretapping by the Warren Court in the famous *Katz* decision³ and its grounding of Fourth Amendment guarantees as

¹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

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² *Id.* at 471-85.

³ *Katz v. United States*, 389 U.S. 347 (1967).

rights of “privacy.”⁴ This conventional story, well-known to any reader of casebooks and law review articles on the Fourth Amendment, turns out to be seriously incomplete. The claim of Brandeis’s dissent to “greatness” along these first two dimensions is less strong than is commonly believed because his view of wiretapping and his more general view of the “privacy” orientation of the Fourth Amendment have been far less fully vindicated than the celebratory view of his dissent implies. Moreover, I wish to assert that Brandeis’s strongest claim to greatness in *Olmstead* lies in what is perhaps his least heeded exhortation, partially quoted in the title to this essay and more fully explored below. Thus, while I advocate for the greatness of Brandeis’s *Olmstead* dissent, it is with an eye for complicating its legacy in ways that both diminish and augment the obvious grounds for cherishing it.

OLMSTEAD

To understand Brandeis’s dissent in *Olmstead* requires an understanding of the underlying legal controversy. Just as the development of Fourth Amendment law in the latter part of the twentieth century has been driven in large part by the war on drugs, the *Olmstead* case was driven by the exigencies of enforcing Prohibition, which began in 1920, the year after the thirty-sixth state ratified the Eighteenth Amendment, and lasted until its repeal by the Twenty-first Amendment in 1933. *Olmstead* involved the investigation and eventual successful prosecution of Roy Olmstead, the infamous “King of the Puget Sound Bootleggers.”⁵

Olmstead had begun his professional career on the other side of the billy club, as an officer in the Seattle Police Department. In 1920, still in his early thirties, Olmstead was the

⁴ See, e.g., WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS 26 (1997) (describing how Brandeis’s conception of Fourth Amendment “privacy” was “completely vindicated” and “enshrined in American law” in *Katz*).

⁵ Daryl C. McClary, *Olmstead, Roy (1886–1966) – King of King County Bootleggers*, HISTORYLINK: THE FREE ONLINE ENCYCLOPEDIA OF WASHINGTON STATE HISTORY (2002), <http://www.historylink.org> (search encyclopedia for “Roy Olmstead” and then follow hyperlink under “Cyberpedia and Features”).

youngest Lieutenant on the Seattle force when he was caught by federal agents from the Treasury Department's Prohibition Bureau smuggling liquor from Canada in violation of the National Prohibition Act, which had gone into effect on the first of the year.⁶ Fined \$500 and fired from the force, Olmstead devoted himself full time to bootlegging and quickly became the most successful and powerful bootlegger in the Seattle area, eventually running an organization of some fifty employees.⁷ Olmstead's operation imported liquor from England to Vancouver in ocean freighters, transferred it to a fleet of speedboats that could each smuggle over 700 cases at a time into the United States, and distributed it by truck and car throughout the Seattle area.⁸ Olmstead supplied not only numerous individual clients, but also "many of the better known hotels and restaurants in town, and even the local press club."⁹ Distributing as many as 200 cases of alcohol a day, Olmstead's operations garnered gross receipts of as much as \$200,000 a month and more than \$2 million a year.¹⁰ Olmstead was the general manager of the business, which he founded and ran with the assistance of eleven others.¹¹ Having contributed roughly half of the initial capital investment, Olmstead in return received half of the profits, with the other eleven partners sharing the remainder.¹² Olmstead's employees admiringly called him the "Big Boy," and he soon became a prime target for criminal investigation.¹³

State and local law enforcement were not much of a problem for Olmstead.¹⁴ He was regularly tipped off by officials inside the Seattle police department, and even the city's mayor

⁶ *Id.*

⁷ WALTER F. MURPHY, *WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS* 17 (1965); McClary, *supra* note 5.

⁸ Murphy, *supra* note 7, at 17.

⁹ *Id.*

¹⁰ *Olmstead*, 277 U.S. at 456 (majority opinion); Murphy, *supra* note 7, at 17.

¹¹ *Olmstead*, 277 U.S. at 456.

¹² *Id.*

¹³ Murphy, *supra* note 7, at 16; see also David A. Sklansky, *Katz v. United States: The Limits of Aphorism*, in Carol S. Steiker, ed., *CRIMINAL PROCEDURE STORIES* 227 (Carol S. Steiker ed., 2006) (citing Norman H. Clark, *Roy Olmstead, A Rumrunning King on Puget Sound*, 54 PAC. NORTHWEST Q. 89 (1963) and Emmett Watson, *Seattle's Colorful Past*, SEATTLE POST-INTELLIGENCER, Oct. 20, 1974, at A1, A2).

¹⁴ See Murphy, *supra* note 7, at 18.

was in his pocket.¹⁵ Federal law enforcement, however, was another matter.¹⁶ Although the United States Bureau of Prohibition was itself no stranger to corruption, dogged federal Prohibition agents in Washington State were not deterred from patiently building a case against the “Big Boy.”¹⁷ Despite being warned by his informants that “the feds” (also referred to as “Uncle”) were on his tail, Olmstead blithely went about his business, unaware that his downfall would lie in the ubiquitous instrument of his commercial success—the telephone.¹⁸

Olmstead might be forgiven for underestimating the threat of electronic eavesdropping on his telephonic communications. Wiretapping was a criminal offense (though a misdemeanor) under Washington state law, and it was also officially prohibited by the federal government.¹⁹ Harlan Fiske Stone, who was appointed Attorney General under President Calvin Coolidge in 1924—and who would later join the Supreme Court and Brandeis’s dissent in *Olmstead*—ordered Justice Department officials not to wiretap.²⁰ The Treasury Department, which was charged with enforcing Prohibition, also officially opposed wiretapping.²¹ Even J. Edgar Hoover, who was selected by Attorney General Stone in 1924 to be Director of the fledgling FBI (then called the Bureau of Investigation), expressed his disapproval of the practice.²² Despite this official unanimity on the impermissibility of wiretapping, the job of enforcing Prohibition was daunting, if not outright impossible, in light of its enormous unpopularity and the rampant corruption and inadequate resources faced by law enforcement personnel.²³ Prohibition officers “were undoubtedly among the most frustrated people of all history.”²⁴ Under these circumstances, dedicated Prohibition

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *See id.* at 12, 18-19.

¹⁸ *See id.*

¹⁹ *Olmstead*, 277 U.S. at 466; Murphy, *supra* note 7, at 13.

²⁰ Murphy, *supra* note 7.

²¹ *Id.*

²² *Id.* at 13; see also *National Affairs: Another Hoover*, TIME, Dec. 29, 1924, at 2-3, available at <http://www.time.com/time/magazine/article/0,9171,751183,00.html>.

²³ Murphy, *supra* note 7, at 12.

²⁴ *Id.*

agents turned to the telephone wires with the hope and expectation that the ends would justify the means.

The wiretapping in Olmstead's case was extensive and methodical.²⁵ Over a period of almost five months, federal agents tapped the phones lines of Olmstead's central office and his home, as well as the homes and offices of several of his associates.²⁶ The agents produced 775 pages of typewritten notes on the conversations overheard during this period.²⁷ Federal investigators used the wiretap evidence to generate search warrants that led to the seizure of further evidence of Olmstead's bootlegging operation,²⁸ and federal prosecutors relied on the wiretap evidence in the grand jury to indict more than 90 people.²⁹ Olmstead eventually stood trial along with forty-six other defendants (including his wife) on charges of conspiring to violate the National Prohibition Act; the prosecutors made the wiretap evidence the centerpiece of their case.³⁰ Olmstead was convicted along with nineteen others (not including his wife) and sentenced to four years in prison plus an \$8,000 fine and responsibility for prosecution costs.³¹

A panel of the Ninth Circuit affirmed Olmstead's conviction by a vote of 2-1, rejecting his challenge to the admission of the wiretap evidence and holding that electronic eavesdropping was not an impermissible Fourth Amendment "invasion" or "seizure," but rather was analogous to simply listening at a door or window, which was constitutionally inoffensive.³² Judge Frank A. Rudkin dissented on the ground that the evidence obtained by the illegal wiretapping should have been suppressed as unconstitutionally seized under the Fourth Amendment.³³ If "ills" such as state-sanctioned illegal wiretapping were constitutionally permissible, Rudkin proclaimed dramatically, "our forefa-

²⁵ See *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Murphy, *supra* note 7, at 19-20.

²⁹ *Id.* at 22.

³⁰ *Id.* at 31-45.

³¹ *Id.* at 44; McClary, *supra* note 5.

³² *Olmstead v. United States*, 19 F.2d 842, 847 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928).

³³ *Id.* at 849-50 (Rudkin, J., dissenting).

thers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity."³⁴

OLMSTEAD IN THE SUPREME COURT

The Supreme Court granted review solely on the constitutional question "whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments."³⁵ The Supreme Court, like the Ninth Circuit, was closely divided (the vote was 5-4), as was the court of public opinion; it is fair to say that *Olmstead* began a national debate about the legal and ethical ramifications of government wiretapping that has waxed and waned to this day. Chief Justice Taft wrote for the Court, rejecting constitutional arguments against the admission of the wiretapping evidence under both relevant Amendments.³⁶

After reviewing the Court's recent precedents construing the Fourth and Fifth Amendments, Taft quickly dispatched the Fifth Amendment argument in exactly the way it would be dispatched were it to be raised today: there was no "compelled"³⁷ self-incrimination because there was "no evidence of compulsion to induce the defendants to talk over their many telephones."³⁸ The voluntary choice to transact business over the telephones made the only relevant issue the means used by the government to gain access to those voluntary communications—a question of search and seizure under the Fourth Amendment rather than impermissible compulsion under the Fifth.³⁹

³⁴ *Id.* at 850.

³⁵ *Olmstead*, 277 U.S. at 455.

³⁶ *Olmstead*, 277 U.S. at 466.

³⁷ The relevant phrasing of the Fifth Amendment reads, "No person shall be . . . compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

³⁸ *Id.* at 462.

³⁹ In an earlier case, the Court had suggested the possibility that reading the Fourth and Fifth Amendments together might somehow enlarge the scope of protected liberty. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court had held inadmissible private papers whose production was compelled by subpoena, even though the subpoena was not technically a "search" or a "seizure" and the creation (as opposed to the produc-

As for the Fourth Amendment, Taft noted that all of the Court's search and seizure precedents involved some sort of "actual entrance into the private quarters of defendant and the taking away of something tangible."⁴⁰ In contrast, noted Taft, the wiretapping involved "no entry of the houses or offices of the defendants" and "[t]he evidence was secured by the sense of hearing and that only."⁴¹ Rejecting the analogy between clandestine eavesdropping on a telephone conversation and opening a sealed letter in the mail, Taft maintained that a letter was a "paper" or an "effect" while a conversation did not fall within the literal language of the Fourth Amendment, which referred to the right of the people to be secure in "their persons, houses, papers, and effects."⁴² Taft argued that attempting "to effect the purpose of the framers of the Constitution in the interest of liberty . . . [could] not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing and sight."⁴³

In response to the argument that the government's wiretapping was unethical and a misdemeanor under Washington state law, Taft noted that the common-law rule of long standing was that "admissibility of evidence is not affected by the illegality of the means by which it was obtained."⁴⁴ The Fourth

tion) of the private papers was not "compelled." In *Olmstead*, Chief Justice Taft made no mention of such a Fourth/Fifth Amendment merger, although the idea still had enough currency to attract three of the four dissenters. Justices Brandeis and Butler both cited *Boyd* approvingly, with Brandeis even quoting *Boyd*'s provocative notion that "the Fourth and Fifth Amendments run almost into each other." *Olmstead*, 277 U.S. at 475 (Brandeis, J., dissenting). Justice Stone noted his agreement with both Brandeis and Butler's analyses. See *id.* at 488 (Stone, J., dissenting). Only Justice Holmes resisted the idea that "the penumbra of the Fourth and Fifth Amendments covers the defendant," though he agreed with the dissenters that the government should not be permitted to use evidence that it had secured through law-breaking. See *id.* at 469 (Holmes, J., dissenting). Today, *Boyd*'s notion of a Fourth/Fifth Amendment merger has been repudiated, see, e.g., *Fisher v. United States*, 425 U.S. 391 (1976), and Justice Brandeis's dissent in *Olmstead* is remembered and revered solely as an exemplar of Fourth Amendment analysis.

⁴⁰ *Olmstead*, 277 U.S. at 464.

⁴¹ *Id.*

⁴² U.S. CONST. amend. IV.

⁴³ *Olmstead*, 277 U.S. at 465.

⁴⁴ *Id.* at 467.

Amendment exclusionary rule (announced by the Court in the relatively recent *Weeks* case⁴⁵) was an exception to the common-law rule that should otherwise prevail in the general run of cases.⁴⁶ In the absence of a Fourth Amendment violation, Taft disclaimed Supreme Court authority to order the exclusion of evidence that was obtained unethically but not unconstitutionally, noting there was "no case that sustains, nor any recognized text book that gives color to such a view."⁴⁷ Moreover, in Taft's view, exclusion in such circumstances would constitute bad policy: "A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore."⁴⁸ As for Washington State's misdemeanor law prohibiting wiretapping, nothing in the state statute purported to (nor lawfully could pretend to) prescribe rules of evidence for federal trials.⁴⁹ According to Taft, if wiretapping by federal officials was to be banned, it fell to Congress to say so.⁵⁰

Justice Brandeis's dissent disagreed with the Court's analysis on both the construction of the Fourth Amendment and the relevance of the government's law breaking. Repudiating the majority's cramped textual analysis, Brandeis made a plea for what is now often referred to as "living constitutionalism," explaining: "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."⁵¹ Looking backward, Brandeis observed that at the time of the adoption of the Fourth Amendment, "'the form that evil had theretofore taken,' had been necessarily simple."⁵² Seizures took place "by breaking and entry."⁵³ But more modern times gave the government "[s]ubtler and

⁴⁵ *Weeks v. United States*, 232 U.S. 383 (1914).

⁴⁶ *Olmstead*, 277 U.S. at 467.

⁴⁷ *Olmstead*, 277 U.S. at 468.

⁴⁸ *Id.*

⁴⁹ *Id.* at 469.

⁵⁰ *Id.* at 468.

⁵¹ *Id.* at 472 (Brandeis, J., dissenting).

⁵² *Id.* at 473.

⁵³ *Id.*

more far-reaching means of invading privacy. . . .”⁵⁴ And electronic eavesdropping was only the beginning, warned Brandeis: “The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping.”⁵⁵ Brandeis asked, rhetorically, “Can it be that the Constitution affords no protection against such invasions of individual security?”⁵⁶

The proper methodology for construing the Fourth Amendment, urged Brandeis, was not an approach of “unduly literal construction,” but rather one that reasoned by analogy and sought to effect the underlying general purpose of the Amendment.⁵⁷ The proper analogy for wiretapping, argued Brandeis, was the opening of a sealed letter in the mail, a practice that the Court had ruled unconstitutional.⁵⁸ Moreover, in Brandeis’s view, wiretapping was much *worse* than opening mail or the ordinary searching and seizing of tangible objects that could have been imagined at the time of the framing of the Constitution: “As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.”⁵⁹

According to Brandeis, the underlying general purpose of the Fourth Amendment was the protection of the right to privacy, or what Brandeis called, with simple elegance, “the right to be let alone”⁶⁰—a right he had advocated and elaborated in the civil context in an influential article published in the *Harvard Law Review* before taking the bench.⁶¹ In what is probably the most famous passage of his dissent, Brandeis expounded on his idea of privacy as the foundation the Fourth Amendment:

⁵⁴ *Id.*

⁵⁵ *Id.* at 474.

⁵⁶ *Id.*

⁵⁷ *Id.* at 476.

⁵⁸ See *Ex Parte Jackson*, 96 U.S. 727 (1878) (holding that letters and sealed packages in the mail may be opened only pursuant to judicial warrant).

⁵⁹ *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

⁶⁰ *Id.* at 478.

⁶¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.⁶²

Moreover, to Brandeis, the noble intentions of the frustrated Prohibition agents did not mitigate in the least the wrongness of their intrusion on Olmstead's privacy; in another famous passage, Brandeis cautioned:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁶³

Brandeis also argued that the Court should have suppressed the use of the wiretap evidence on *non-constitutional* grounds, based on the unlawfulness of the government's conduct (presumably by use of the Court's inherent supervisory powers). Brandeis observed that wiretapping was a crime under Washington state law and not authorized by Congress, the Department of Justice, or the Prohibition Unit of the Treasury. In contrast to Taft's invocation of the common-law rule allowing the admission of evidence that had been illegally obtained, Brandeis invoked the principle of "unclean hands" from courts of equity, also commonly applied in courts of law in private disputes.⁶⁴

⁶² *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting).

⁶³ *Id.* at 479.

⁶⁴ *Id.* at 483-84.

This counter-doctrine denies the court's aid "when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress."⁶⁵ In one sense, the precept that courts should not allow people to profit from their own crimes appeals to a non-instrumental sense of purity, to an idea of contamination more familiar to the ancient world than our own; Holmes captured this sense in his separate dissent when he referred to the government's law breaking as a "dirty business."⁶⁶ Brandeis, on the other hand, focused on the equally strong instrumental grounds for the doctrine of unclean hands, explaining that it was essential in order "to maintain respect for law."⁶⁷ Moreover, he noted that when the government (rather than a private party) was the lawbreaker, the reasons for applying the doctrine were "even more persuasive," and that when the case was one involving criminal punishment, the reasons became "compelling."⁶⁸ In the most stirring passage in a dissent full of passionate verve, Brandeis proclaimed:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.⁶⁹

⁶⁵ *Id.* at 484.

⁶⁶ *Id.* at 470 (Holmes, J., dissenting).

⁶⁷ *Id.* at 484 (Brandeis, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.* at 485.

BRANDEIS TRIUMPHANT

One of the primary reasons that Brandeis's dissent in *Olmstead* is so widely recognized as "great" is the fact that he was substantially vindicated by later events. In the short term, although *Olmstead*'s conviction was upheld by the highest Court in the land and he served out the four years of his sentence, *Olmstead* eventually won his case in another way: he received a full pardon from President Franklin D. Roosevelt during the Christmas week of 1935, a pardon which restored his civil rights and relieved him of the \$8,000 fine plus court costs that he had never paid.⁷⁰ It is hard to say whether the pardon reflected distaste for the government wiretapping that had netted *Olmstead* or simply for the recently repealed failed experiment with Prohibition. Whatever its motivation, the pardon turned out to be a good bet on the future: *Olmstead* experienced a religious conversion and went on to live a quiet and law-abiding life over the next three decades, teaching Sunday school and faithfully visiting prison inmates to spread the good word.⁷¹

The future eventually vindicated Roosevelt's pardon of *Olmstead* and Brandeis's dissent in a more direct and encompassing way—in the Supreme Court's formal overruling of its *Olmstead* decision in the famous 1967 *Katz* case,⁷² decided a year after *Olmstead*'s death at the age of 79. In *Katz*, the Court addressed professional gambler Charlie Katz's Fourth Amendment challenge to the FBI's wiretapping of the public telephone booth in Los Angeles from which he routinely placed his bets, often with out-of-state bookmakers. This wiretap, like that in *Olmstead*, did not require any entrance into the telephone booth (much less into a home or office); rather, the electronic listening and recording device (basically, a tape recorder with a microphone attached) was taped to the back of the phone booth.⁷³ The information collected from the wiretap was used to convict Katz of transmitting wagering information by telephone across state

⁷⁰ See *The Presidency: The Roosevelt Week*, TIME, Jan. 6, 1936, available at <http://www.time.com/time/magazine/article/0,9171,755551,00.html>.

⁷¹ McClary, *supra* note 5.

⁷² *Katz v. United States*, 389 U.S. 347 (1967).

⁷³ *Id.* at 348-49.

lines in violation of federal law. In the Ninth Circuit Court of Appeals, the feds successfully defended their wiretap against Katz's appeal by arguing directly under *Olmstead* that there could be no Fourth Amendment violation because "[t]here was no physical entrance into the area occupied by [Katz]." ⁷⁴

The Supreme Court reversed. Although the Court had begun to question the underlying rationale of *Olmstead* in a few recently preceding cases, ⁷⁵ it was not until *Katz* that *Olmstead* was clearly and officially interred. Justice Stewart wrote for the Court and squarely rejected the government's argument that the reach of the Fourth Amendment should "turn upon the presence or absence of a physical intrusion into any given enclosure." ⁷⁶ Rather, the Court explained, "the Fourth Amendment protects people, not places," ⁷⁷ and thus the crucial question should be whether the government's actions violated the protection that the Amendment bestowed upon Katz himself, rather than upon the integrity of the telephone booth. The Court concluded that Katz's Fourth Amendment rights had been infringed because the government's wiretap "violated the privacy upon which [Katz] justifiably relied while using the telephone booth." ⁷⁸ Justice Harlan wrote an influential concurrence that has come to be synonymous with *Katz* (though it was not joined at the time by any other Justice), explaining that the protection of "people, not places" requires an inquiry into whether a person had an "expectation of privacy" that is one that "society is prepared to recognize as 'reasonable.'" ⁷⁹

Had Brandeis still been alive in 1967 (he died in 1941), he surely would have had many reasons to count *Katz* as a belated vindication of his *Olmstead* dissent. On the most basic level,

⁷⁴ *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966).

⁷⁵ See *Silverman v. United States*, 365 U.S. 505, 510-11 (1961) (finding that a government recording device constituted a Fourth Amendment violation even in the absence of a "technical trespass" because the placement of the microphone required some "physical encroachment" on the defendant's home); *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited.")

⁷⁶ *Katz*, 389 U.S. at 353.

⁷⁷ *Id.* at 351.

⁷⁸ *Id.* at 353.

⁷⁹ *Id.* at 361 (Harlan, J., concurring).

Katz declared the “trespass” doctrine of *Olmstead* “no longer . . . controlling,”⁸⁰ and Shephard’s authoritative citation service lists *Olmstead* as “overruled” by *Katz*. Moreover, the rejection of *Olmstead*’s trespass doctrine would allow the Court in the future to regulate the “subtler and more far-reaching means of invading privacy” not involving “breaking and entry” that Brandeis had predicted would evolve.⁸¹ Decades after the *Katz* decision, the Court would invoke it to strike down the government’s use of a thermal imaging device used by federal agents to detect the heat emitted from a home without any trespass on the homeowner’s property.⁸² This sort of technological innovation is precisely what Brandeis imaginatively foresaw in 1928. Finally, Brandeis could have felt vindicated by the Court’s replacement of the trespass doctrine with one more oriented toward the right of “privacy.” The majority’s language emphasizing “the privacy upon which [Katz] justifiably relied” and Harlan’s concurring language emphasizing “reasonable expectations of privacy” appeared to echo Brandeis’s emphasis on privacy as the central value underlying the Fourth Amendment.

THE LIMITS OF BRANDEIS’S TRIUMPH

Brandeis’s triumph, however, is not nearly as neat or complete as it might seem or is often proclaimed to be. First, the last sentence of the preceding section says that the language of the *Katz* majority and Harlan’s influential concurrence “appear” to echo Brandeis’s emphasis on privacy, and the word “appear” is used advisedly here. Although *Katz*’s privacy-affirming language is oft cited, the case also contains important qualifiers on this language that, while less well-known, better predict the path that Fourth Amendment law was to follow after *Katz*. Perhaps most surprising to those familiar with the triumphal account of *Katz*, the majority opinion explicitly rejects the idea of “privacy” as a grounding rubric for the Fourth Amendment:

⁸⁰ *Id.* at 353.

⁸¹ *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

⁸² *Kyllo v. United States*, 533 U.S. 27 (2001).

[T]he Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.⁸³

Perhaps most ironic, in light of the widespread view that *Katz* instantiated Brandeis’s view of the Fourth Amendment, is the fact that while *Olmstead* is discussed throughout the *Katz* opinion, Brandeis’s dissent is never mentioned; indeed, Brandeis’s name appears but once, in a citation to his article about privacy as the right “to be let alone”—but only to clarify that this right is *not* the foundation of the Fourth Amendment!⁸⁴

In the decades following *Katz*, the Court frequently invoked the idea of “reasonable expectations of privacy” in order to determine the scope of the Fourth Amendment, but the Court’s view of which expectations of privacy were reasonable tended to be narrow and bound by conventional understandings of property and place. On the role of property rights in Fourth Amendment analysis, consider *Rakas v. United States*, in which the Court held that the search of car did not violate any reasonable expectation of privacy of an occupant of the car who could assert “neither a property nor a possessory interest in the automobile, nor an interest in the property seized.”⁸⁵ The Court paid lip service to *Katz* but noted that “the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment.”⁸⁶ On the role of place, consider the Court’s opinion in *Kyllo*, which re-affirmed *Katz*’s holding that physical encroachment was not essential to establish a Fourth Amend-

⁸³ *Katz*, 389 U.S. at 350-51 (footnotes omitted).

⁸⁴ *See id.*

⁸⁵ *Rakas v. United States*, 439 U.S. 128, 148 (1978).

⁸⁶ *Id.* at 143 n.12.

ment intrusion and while at the same time undermining *Katz*'s insistence that the Fourth Amendment protects people rather than places, by emphasizing the fact that the thermal imaging at issue was of a special place—the home. The *Kyllo* Court, building on a line of cases extending unbroken from long before *Katz* to the twenty-first century, held that the home is a place of unique protection: "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."⁸⁷ The turn to property rights and traditional views of constitutionally protected places is perhaps not surprising, given the indeterminacy of the idea of "reasonable expectations of privacy." But the attempt to give meaning to the *Katz* standard tended to undo it over time; as one scholarly observer has noted, wryly, "the results reached under the new, 'expectation of privacy' test looked surprisingly like the results that would have been reached under the old, 'trespass' test."⁸⁸ Thus, the apparent apotheosis of privacy as the Fourth Amendment touchstone in *Katz* quickly gave way to the re-emergence of a kind of constitutional reasoning and a set of constitutional results that would likely be more appealing to the *Olmstead* majority than to Brandeis.

Privacy aside, the *Katz* decision contained an additional twist presenting another divergence from Brandeis's view in *Olmstead*. The *Katz* Court did not conclude its constitutional inquiry with its holding that governmental wiretapping was within the ambit of the Fourth Amendment's protection. Rather, having determined that the Fourth Amendment applied to electronic eavesdropping (even absent a physical intrusion into a constitutionally protected space), the Court went on to hold that what rendered unconstitutional the government's wiretapping of *Katz*'s phone booth was the failure to get a judicial warrant to do so, which could have "accommodated the legitimate needs of law enforcement by authorizing the carefully limited

⁸⁷ *Kyllo*, 533 U.S. at 37. The Court's special Fourth Amendment protection of the home has tended to create reduced protection everywhere else. As David Sklansky has observed, "In other places—automobiles, highways, fields, offices, even backyards—Fourth Amendment protection, as a practical matter, either vanished entirely or dropped off dramatically." Sklansky, *supra* note 13, at 257.

⁸⁸ Sklansky, *supra* note 13, at 254.

use of electronic surveillance.”⁸⁹ This view of wiretapping—as just another garden-variety search and seizure that can be deemed reasonable (or not constitutionally “unreasonable”) when authorized by a judicial warrant—is wholly out of sync with Brandeis’s view that wiretapping was fundamentally inconsistent with the preservation of Fourth Amendment freedoms. Recall that in Brandeis’s view, “writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.”⁹⁰ Such writs would not be rendered acceptable if issued by a neutral magistrate; rather, their sweeping nature and scope make them so great a threat to liberty that they are constitutionally anathema whatever their source of issuance. In Brandeis’s view, wiretapping belonged in the same category. His view had adherents up until the moment of the *Katz* decision: at the tail end of the Term immediately prior to the one in which *Katz* was decided, the Court debated, without deciding, whether warrants authorizing wiretapping were like general warrants in that they necessarily constituted a dragnet rather than a particularized search.⁹¹ The *Katz* decision resolved this debate without further discussion in favor of permitting judicial warrants, but it is clear that Brandeis’s view would have been to the contrary. Moreover, the failure of the Supreme Court to either ban wiretapping altogether or subject it to more specific limitations than the warrant clause left the whole field of regulation of wiretapping to the legislative branches—exactly the position urged by Chief Justice Taft in his opinion for the Court in *Olmstead*.

One final way in which Brandeis’s *Olmstead* dissent has failed to emerge victorious in the post-*Katz* era has been the Court’s rejection of the general constitutional methodology that Brandeis used to reach his particular interpretation of the Fourth Amendment. Brandeis urged that constitutional protections—*especially* “[c]auses guaranteeing to the individual protection against specific abuses of power”—must have the “capac-

⁸⁹ *Katz v. United States*, 349 U.S. 347, 356 (1967) (quotation marks and footnote omitted).

⁹⁰ *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

⁹¹ See *Berger v. New York*, 388 U.S. 41 (1967).

ity of adaptation to a changing world."⁹² But in the decades since *Katz*, the Court has increasingly moved toward a textualist/originalist mode of constitutional interpretation—*especially* in the Fourth Amendment context, where the Court has looked to settled understandings at common law at the time of the framing of the Constitution in order to determine which government actions are reasonable today.⁹³ For example, in 1995, in *Wilson v. Arkansas*,⁹⁴ the Court was called upon to determine whether police officers must knock and announce their presence before breaking down a door in the execution of a warrant. Instead of attempting any consideration of the attributes and needs of contemporary law enforcement or the privacy concerns of contemporary citizens vis-à-vis the police in such contexts, the Court consulted only framing-era common law in rendering its decision. Similarly, in 2001, in *Atwater v. City of Lago Vista*,⁹⁵ the Court devoted the bulk of its constitutional analysis of the reasonableness of a custodial arrest for a fineable-only misdemeanor to consideration of whether common-law practices authoritatively precluded such arrests in the vastly different world of the eighteenth century. To what would undoubtedly have been Brandeis's great dismay, far from being the strongest case for purposive and openly normative constitutional elaboration, Fourth Amendment analysis has become the stronghold of historical exegesis.

The Supreme Court's failure in *Katz* and beyond to heed Brandeis's call in *Olmstead* for privacy as the fundamental grounding for the Fourth Amendment might seem naturally to lead here to a full-throated defense of Brandeis's dissent and a detailed critique of the myriad ways in which current law diverges from his vision. Such critiques are a staple of Fourth Amendment scholarship, along with more recent attempts to replace Brandeis's privacy grounding with some more attractive

⁹² *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

⁹³ The best description and discussion of this development can be found in David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

⁹⁴ 514 U.S. 927 (1995).

⁹⁵ 532 U.S. 318 (2001).

or administrable alternative.⁹⁶ Rather than engage in this debate over whether Brandeis's defense of privacy in *Olmstead* should have emerged more triumphantly from history than it has, I wish to turn the spotlight from the privacy aspect of Brandeis's dissent to a less discussed but (I suggest) even more significant or "greater" part of his analysis—Brandeis's concern about the "pernicious" effects of intentional government law-breaking.

THE GOVERNMENT AS TEACHER

What could possibly constitute a bigger fish to fry than the right to privacy? My nomination for the "greatest" aspect of Brandeis's *Olmstead* dissent is his at once lyrical and indignant call for the repudiation of government lawbreaking in the pursuit of its own law enforcement goals.⁹⁷ Here, Brandeis went beyond offering a grounding theory or rubric for a particular constitutional provision and offered a more general normative observation about the relationship between government and citizen. Brandeis portrayed government ("our" government) as a teacher—and not just as any teacher, or as one among many teachers, but as "the potent, the omnipresent teacher." In Brandeis's view, government teaches not only by what it says, but by its example; if the government breaks the law, it teaches contempt for law, and thus "it invites every man to become a law unto himself; it invites anarchy." Government law breaking in pursuit of government law enforcement would, in Brandeis's dire prediction, "bring terrible retribution." "Against that pernicious doctrine this court should resolutely set its face." Bran-

⁹⁶ See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?* 33 WAKE FOREST L. REV. 307 (1998); Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803 (2009); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995); Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?" 94 COLUM. L. REV. 1751 (1994).

⁹⁷ The relevant passage, beginning "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen . . ." is reproduced in full above. The quotations in the following paragraph are found in this previously cited material. See *supra* note 69.

deis urged the Court's rejection of the government's lawbreaking not as a product of constitutional interpretation, but instead as grounded in the Court's inherent powers of justice, citing the similar exercise of power by courts of equity through the doctrine of "unclean hands."⁹⁸

This passage is beautiful, but it has two other attributes that render it "great." First, it is astonishingly relevant. Brandeis was extrapolating from a specific context of government lawbreaking involving frustrated federal agents attempting to enforce Prohibition at a time when wiretapping was clearly (and criminally) prohibited. He wrote long before our country's most dramatic encounter with government lawbreaking—the Watergate scandal, often cited as promoting a sea-change in public attitudes about government.⁹⁹ Even more recent and more relevant is our country's post-9/11 encounter with the assertion by the federal executive branch of the right to use means that had long been considered illegal to fight the "War on Terror"—racial profiling, detention without hearing, torture, and domestic eavesdropping without congressional authorization. Brandeis presciently saw that the temptation "[t]o declare that in the administration of the criminal law the end justifies the means" was a universal one, and his warning against it remains startlingly fresh.¹⁰⁰ Second, Brandeis was right about the consequences of government law breaking—or as right as the current state of social science can confirm. Brandeis's assertion that government law breaking leads to private "contempt for law" has turned out to be more than homely folk wisdom—social scientists have treated it (or cognates of it) as a testable hypothesis that has tremendously important implications, both for the administration of criminal justice and for the establishment of appropriate moral and legal limits on the exercise of state power.

Of course, Brandeis's government integrity argument did not win in *Olmstead*, nor has it triumphed in the succeeding

⁹⁸ *Olmstead*, 277 U.S. at 483-84.

⁹⁹ See, e.g., Adam Clymer, *Watergate's Shadow Lies Across the Land*, N.Y. TIMES, June 14, 1992, at § 4; p. 3; col. 1.

¹⁰⁰ *Olmstead*, 277 U.S. at 468.

eighty years. Although I argue above that Brandeis's privacy grounding for the Fourth Amendment has been far less vindicated than is commonly imagined, his "unclean hands" or government integrity argument has had even less success. In what follows, I will track the largely negative legal treatment of Brandeis's government integrity argument, particularly with reference to the Fourth Amendment, and then contrast this dismissal with the much more respectful treatment of Brandeis's argument by social scientists seeking to understand the wellsprings of human behavior.

As a doctrinal matter, what Brandeis appeared to be calling for in his government integrity argument in *Olmstead* was more robust use of courts' inherent, non-constitutional supervisory powers to refuse to participate in government wrongdoing and to sanction government actors for law breaking by excluding evidence obtained unlawfully from court. Even during the Warren Court era, however—the relative heyday of the use of the Fourth Amendment exclusionary rule—Chief Justice Warren himself dissented from the Court's failure to use its non-constitutional supervisory powers to exclude the testimony of a shady informant that the government had planted to infiltrate Jimmy Hoffa's legal team during the infamous "Test Fleet" trial.¹⁰¹ An even more outrageous case during the Burger Court found the use of the Court's supervisory powers inappropriate, despite the fact that government agents had broken into a hotel room and stolen a briefcase with incriminating papers in it, on the ground that the person whose hotel room they broke into was not the defendant against whom the papers were used.¹⁰² As a practical matter, although federal courts have invoked their inherent supervisory power with some frequency over the years to regulate a broad range of conduct,¹⁰³ the use of supervi-

¹⁰¹ See *Hoffa v. United States*, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting) ("[O]ne of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement.").

¹⁰² See *Payner v. United States*, 447 U.S. 727 (1980).

¹⁰³ See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV.

sory power to exclude relevant evidence of guilt in criminal trials in order to promote government integrity has been rare.¹⁰⁴

Although Brandeis did not advance this argument himself in *Olmstead*, later judges (generally, though not always, dissenters) have used arguments founded on government integrity as a means to construe the Fourth Amendment itself, rather than as an extra-constitutional consideration. These judges have maintained either that law breaking by the government is relevant to determining whether the government's conduct is "reasonable" under the Fourth Amendment or that the preservation of government integrity is a (or even *the*) key rationale for the Fourth Amendment's exclusionary rule. Neither of these categories of attempts to import the government integrity idea into the Fourth Amendment itself has triumphed, but the argument has not been extinguished and still sparks to life occasionally in both federal and state opinions.

In the context of determining the Fourth Amendment "reasonableness" of various investigative tactics, the Supreme Court has given little or no weight to the fact that the tactics employed by the government were themselves criminal offenses. For example, in *Oliver v. United States*, the Court held that state narcotics agents in Kentucky did not invade any "reasonable expectation of privacy" by entering onto the defendant's land and bypassing a locked gate with a "no trespassing" sign posted on it, despite the fact that such action would almost certainly constitute a criminal trespass under Kentucky law.¹⁰⁵ Over strenuous dissent, the Court dismissed the criminal trespass law as protecting interests distinct from privacy and thus deemed it of "lit-

1433, 1433 (1984) (describing the robust use of such power by lower federal courts and its "sporadic" invocation by the Supreme Court).

¹⁰⁴ *Id.* at 1453:

The exclusion of evidence to preserve the integrity of the courts and to deter official misconduct may interfere with the accuracy and reliability of the courts' search for the truth. Although the Court has often been divided on this issue, it has generally given precedence to the search for the truth . . . (footnote omitted). *Id.*

¹⁰⁵ *Oliver v. United States*, 466 U.S. 170, 190 (1984) (Marshall, J., dissenting) ("In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass.") (citing KY. REV. STAT. §§ 511.070(1), 511.080, 511.090(4) (1975)).

tle or no relevance” to Fourth Amendment analysis.¹⁰⁶ The Court took a similar approach in *California v. Greenwood*, validating the warrantless search and seizure of garbage bags left at the curb as constitutionally “reasonable” despite the widespread existence of ordinances prohibiting anyone except authorized trash removal personnel from interfering with garbage left for collection, presumably on similar grounds (i.e., that prohibitions on interfering with garbage are more likely based on aesthetic and public health grounds than on privacy grounds).¹⁰⁷ In a related and more general context, the Court in *Virginia v. Moore* held that arrests that are illegal under state law are still constitutionally reasonable, as long as they are supported by probable cause.¹⁰⁸ Here, the arrest was unlawful in the sense of unauthorized (and thus subject to disciplinary sanctions and tort remedies, rather than criminal punishment), and the Court relied on the undesirable complexity of altering the constitutional standard of reasonableness to accommodate the variety in state and local laws.¹⁰⁹ The Court did not suggest, however, that the lack of a criminal sanction for the violation was key to its holding; it simply did not consider any form of the argument from government integrity or consider whether the constitutional analysis might change in the context of willful violations of state criminal laws.

Despite the Supreme Court’s skepticism regarding the relevance of government law breaking to Fourth Amendment reasonableness, the argument has had some greater appeal in state constitutional litigation, most likely because individual states do not face the problem that the Court noted in *Moore*—state constitutional standards need apply only statewide and thus do not have to accommodate any variety in the substance of criminal prohibitions. As a consequence, Brandeis’s *Olmstead* dissent regarding government integrity finds its most approving

¹⁰⁶ *Id.* at 183-84 (majority opinion). Ironically, the interests promoted by criminal trespass laws that the Court declared to be distinct from privacy interests were the landowners’ property interests. See *Rakas*, 439 U.S. at 148.

¹⁰⁷ *California v. Greenwood*, 486 U.S. 35 (1988).

¹⁰⁸ 128 S. Ct. 1598 (2008) (upholding a full custodial arrest despite the fact that state law authorized only the issuance of a summons for the offense in question).

¹⁰⁹ *Id.* at 1607.

citations by state supreme courts interpreting their own analogs to the Fourth Amendment. For example, courts in both New York and Oregon have rejected the U.S. Supreme Court's holding in *Oliver* that entry onto "open fields" is constitutionally reasonable, citing the existence of state criminal trespass statutes prohibiting such conduct.¹¹⁰ These courts held not only that the existence of these criminal statutes expressed state-wide understandings of privacy, but also that the maintenance of governmental integrity required the suppression of evidence collected in such a manner. Both courts cited—indeed, quoted!—Brandeis's "government as teacher" language from *Olmstead*. Other state courts have used Brandeis's government integrity rationale (and credited his *Olmstead* dissent) to depart from additional restrictive Fourth Amendment rulings issued by the Supreme Court.¹¹¹ These deviations from the Supreme Court's federal constitutional rulings on the Fourth Amendment do not represent a majority or even a very substantial minority of state court rulings, but they do show that Brandeis's argument from integrity is alive and well, at least in pockets of state constitutional jurisprudence.

The second way that the argument from government integrity might play a role in Fourth Amendment analysis is as a rationale for the Fourth Amendment's exclusionary rule. Although the Court gave sympathetic voice to that argument in *Mapp v. Ohio* when it first incorporated the exclusionary rule (indeed, *Mapp* is the most famous and important case that quotes Brandeis's "government as teacher" language from *Olmstead*),¹¹² the integrity rationale has long been authoritatively discarded as a principle that should shape the constitutional contours of the rule. Although Justice Clark, writing for the Court in *Mapp*, invoked "the imperative of judicial integrity"

¹¹⁰ See *People v. Scott*, 593 N.E.2d 1328 (N.Y. 1992); *State v. Dixon*, 740 P.2d 1224 (Or. Ct. App. 1985).

¹¹¹ See, e.g., *State v. Hess*, 770 N.W.2d 769 (Wis. Ct. App. 2009) (modifying the "good faith" exception to the warrant requirement under the Wisconsin state constitution in order to preserve government integrity); *State v. Van Haele*, 649 P.2d 1311 (Mont. 1982) (applying exclusionary rule under the Montana state constitution to exclude evidence illegally seized by private citizens and turned over to the police).

¹¹² *Mapp v. Ohio*, 367 U.S. 643 (1961).

and quoted Brandeis's *Olmstead* dissent at length,¹¹³ little time passed before the Court fundamentally reoriented the grounding of the exclusionary rule. The following decade, in holding that the exclusionary rule did not apply in grand jury proceedings, the Court in *United States v. Calandra* sweepingly pronounced that the exclusionary rule was wholly preventive in nature: "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect"¹¹⁴ Thus, held the Court in *Calandra* and many subsequent cases, the remedy of exclusion, which engenders substantial social costs by suppressing reliable evidence of guilt, should be limited to those circumstances in which it will have a significant marginal deterrent effect on government wrongdoing.¹¹⁵ Consequently, because law enforcement officers presumably will be sufficiently deterred by the prospect of the suppression of illegally seized evidence at trial, there is no need to apply the exclusionary rule in grand jury proceedings as well. In such a calculus of marginal deterrent effects, there is simply no room for government integrity as a value to be safeguarded by the exclusionary rule. Two years after *Calandra*, in holding that Fourth Amendment exclusionary rule claims could not be raised on federal habeas corpus, the Court in *Stone v. Powell* placed the final nail in the integrity rationale's coffin.¹¹⁶ After reviewing all of its Fourth Amendment holdings that appeared to be inconsistent with the judicial integrity rationale, the Court declared: "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."¹¹⁷

While the role of the integrity argument as a grounding for the federal Fourth Amendment exclusionary rule might seem to be a long dead letter, a very recent decision by the Supreme Court appears to have breathed new life into the dispute,

¹¹³ *Id.* at 659 (citation omitted).

¹¹⁴ *United States v. Calandra*, 414 U.S. 338, 348 (1974).

¹¹⁵ *Id.*

¹¹⁶ *Stone v. Powell*, 428 U.S. 465 (1976).

¹¹⁷ *Id.* at 485.

though without changing the doctrine. Last Term in *Herring v. United States*, the Court refused to apply the exclusionary rule to suppress evidence found when the defendant, Herring, was searched pursuant to an arrest warrant listed in a neighboring county's database that had been recalled months earlier, though this recall had never been entered in the database.¹¹⁸ The Court held that the exclusionary rule did not apply to the fruits of an unlawful arrest that was the product of "isolated negligence attenuated from the arrest,"¹¹⁹ rather than from "deliberate, reckless, or grossly negligent conduct" or "recurring or systemic negligence."¹²⁰ Although the facts of *Herring* are odd enough that the reach of the Court's holding remains in doubt, the bare majority's announcement of what sounds like a new limitation on the scope of the exclusionary rule drew furious fire from the dissenters and resulted in a dissenting opinion that raised the government integrity rationale from the grave. Writing for all four dissenters, Justice Ginsburg questioned the deterrence rationale as the sole basis for the exclusionary rule and invoked instead "a more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule."¹²¹ Lest it be unclear what such a conception could be, Justice Ginsburg explained the government integrity rationale with as much clarity, if not quite as much verve, as Brandeis:

[T]he rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."¹²²

Following this explanation comes the obligatory quotation from Brandeis in *Olmstead*.¹²³

¹¹⁸ *Herring v. United States*, 129 S. Ct. 695 (2009).

¹¹⁹ *Id.* at 698.

¹²⁰ *Id.* at 702.

¹²¹ *Id.* at 707 (Ginsburg, J., dissenting) (citation omitted).

¹²² *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

¹²³ *Id.*

Herring by no means suggests that the Court is teetering on the edge of reviving the integrity rationale for the exclusionary rule. The integrity rationale garnered only four votes last Term, and Justice Souter has already been replaced by Justice Sotomayor, who may not turn out to be a traditional Fourth Amendment liberal (or not as much of one as Souter was).¹²⁴ But while it is undeniable that Brandeis's government integrity argument has not been wildly successful in shaping legal doctrine, it is still fair to suggest that it remains a powerful idea with enough force to keep it alive in legal discourse, move the occasional state constitutional court, and perhaps—who knows?—spark a larger revival sometime in future.

In contrast, Brandeis's view has had the most success outside of the courts, in the non-legal, non-normative study of human behavior—the field of psychology. Brandeis's "government as teacher" argument posited that government law breaking would have a substantial effect on the behavior of ordinary citizens—in particular, that the courts' apparent imprimatur on government misconduct would "breed[] contempt for law" and "invite[] anarchy."¹²⁵ Brandeis's folk wisdom has a corresponding folk response: No, the best way to promote respect for law and to prevent anarchy is to ensure that those prosecuted for crimes are convicted. That is, inflicting just punishment on criminals is a better way to promote compliance with law than standing up for government integrity when doing so will interfere with the infliction of just punishment. It turns out that this folk debate is the stuff of serious scholarly inquiry and that over the past few decades, the tide has swung considerably toward the Brandeis view.

In his groundbreaking work *Why People Obey the Law*, psychologist Tom Tyler describes a longitudinal empirical study in which he measured the effect of "normative factors" in influencing citizens' compliance with the law independently of "deterrence judgments."¹²⁶ Tyler explains that people may obey the

¹²⁴ See Jess Braven & Nathan Koppel, *Nominee's Criminal Rulings Tilt to Right of Souter*, WALL ST. J., June 5, 2009, at A3.

¹²⁵ *Olmstead v. United States*, 277 U.S. 438, 468 (1928).

¹²⁶ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4 (Yale Univ. Press 1990).

law because they view it is as just and moral to do so, as opposed to simply calculating whether they may face unpleasant sanctions for failing to obey. People's ideas about what is just and moral may come from their own internal morality, or from the perceived "legitimacy" of the authority enforcing the law (the view that "the authority enforcing the law has the right to dictate behavior").¹²⁷ Tyler's experiment demonstrated that "normative issues matter"—that people obey the law because they believe it is proper to do so, that their views of whether it is proper to do so depend on perceived legitimacy, and—crucially, for the Brandeis perspective—that perceptions of legitimacy are influenced by adherence to procedural justice.¹²⁸ In particular, "[w]hen people react to their dealings with police officers and judges they focus their attention sharply on questions of procedural justice."¹²⁹ While the concept of "procedural justice" is a broad umbrella that encompasses many aspects of fairness that are far afield from Brandeis's concern about the toleration of government law breaking (such as consistency and suppression of bias), procedural justice also includes evaluation of "honesty and "ethicality" in the administration of the law,¹³⁰ concerns that presumably would encompass the toleration of law breaking by the judicial process. Tyler, in collaboration with others, has followed up with many further empirical studies consistently supporting the role of legitimacy and procedural justice in promoting legal compliance, particularly in the context of policing.¹³¹

Legal scholars have speculated that Tyler's work may explain some of the variations in crime rates and other forms of legal noncompliance that appear to correlate to places and times in which law enforcement legitimacy ebbs and flows. Law pro-

¹²⁷ *Id.*

¹²⁸ *Id.* at 178.

¹²⁹ *Id.* at 104.

¹³⁰ *Id.* at 118; see also, Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Address the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

¹³¹ See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler & Cheryl Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004).

fessor and former federal prosecutor Bennett Capers has speculated that the month-long spike in crime across the board following the fatal shooting of unarmed Amadou Diallo in New York City, as well as the additional spike that followed the acquittal of the officers involved that following year, supports Tyler's claim that there is a correlation between perceptions of legitimacy and levels of crime.¹³² He further suggests that there may be "smaller rebellions" or forms of legal noncompliance that may be the product of ebbing legitimacy, such as "[n]ot assisting the police by providing information about a crime," or "[d]isregarding jury duty, or serving but voting to acquit a guilty defendant to send a message about police practices."¹³³ The work of law professor and former state prosecutor, Tracey Meares, also stresses the links between legitimacy and law enforcement, with a particular interest in addressing crime policy in poor, minority neighborhoods.¹³⁴

The insights of psychology have been far more kind to Brandeis's "government as teacher" argument than the courts have been. But that is no criticism; rather, it is the reason to celebrate this aspect of Brandeis's argument more than other aspects which may have found more vindication in the courts. The greatest sign of "greatness" is to be right—not in the sense of being borne out by legal doctrine, but rather right in the larger sense of describing a truth about the human condition. Brandeis's folk wisdom about the dangers that might follow from the official condoning of government law breaking has found strong vindication in the work of contemporary psychologists and offers insights to contemporary legal scholars and policy makers that have tremendous significance for the difficult policy choices that our criminal justice institutions currently face.

¹³² Bennett Capers, *Crime, Legitimacy and Testilying*, 83 IND. L.J. 835, 865 (2008).

¹³³ *Id.*

¹³⁴ See, e.g., Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391 (2000); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651 (2009).

“FOR GOOD OR FOR ILL . . .”

Although Brandeis declared that the government is a teacher “for good or for ill,” his warning and this essay both focused on the “ill” part of his observation, on the consequences that might flow from official tolerance of government law breaking. But Brandeis’s dissent is itself an illustration of the “good” aspect of his observation. Supreme Court Justices are, after all, part of the government, and they teach—perhaps most especially through their dissents.¹³⁵ Brandeis’s dissent thus performs what I maintain is his “greatest” message in an opinion full of quotable, thought-provoking passages—in a government of law and not of men, the actions of the government are not merely the actions of men (or women), but rather, they carry a meaning and a consequence to which we fail to attend at our peril.

¹³⁵ For a wonderful exploration of the ways in which dissents play an important role in promoting deliberation and legitimacy, see Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

The James Otis Lectures

ANNUAL LECTURE SERIES



This lecture series is fittingly named after the man who not only ignited the American Revolution, but whose very words in opposition to the writs of assistance inspired the Fourth Amendment, James Otis.

Born in Great Marshes (now West Barnstable), Massachusetts, the eldest of thirteen children, Otis would devote his life to the law, as his father and grandfather had done before, becoming one of the most revered trial advocates and legal orators throughout Massachusetts, earning him the coveted position as Advocate General of the Vice-Admiralty Court at just thirty-one years of age, a position he would later resign to champion the cause against the Crown's arbitrary issuance of writs of assistance. The writs were general search warrants that permitted the authorities to search anywhere they pleased for any reason—or for no reason. In one of the first defiant stands against British authority in the Colonies, Otis attacked the writs as

"against the fundamental principles of law."¹ He asserted, among other things: "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege."²

John Adams, who witnessed Otis's impassioned oration, afterward declared: "Every man of an [immense] crowded audience appeared to me to go away, as I did, ready to take arms against [Writs] of Assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."³

Although Otis may have lost his case before the Massachusetts Superior Court in Boston's Old Town Hall that day, he gained a place in history. In that case, "the American tradition of constitutional hostility to general powers of search first found articulate expression."⁴ It was Adams, so inspired by Otis's words, who later drafted Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment.

Otis would become one of the greatest Patriots our country has ever known. Though eventually reduced to insanity and ultimately silenced by a bolt of lightning, James Otis will forever remain first among America's Fourth Amendment advocates.

*Thomas K. Clancy**

¹ TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 36-37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

² *Id.* at 37 (quoting 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 142).

³ 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 107.

⁴ M.H. SMITH, THE WRITS OF ASSISTANCE CASE 7 (1978).

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THE ROAD TO REASON: *ARIZONA V. GANT* AND THE SEARCH INCIDENT TO ARREST DOCTRINE

*Myron Moskowitz**

Officer Copp arrests Dan in his bedroom, handcuffs Dan, takes him out of the room, and locks him in a patrol car. Then Copp returns to the bedroom and searches the room. The officer has no search warrant, no probable cause to believe there is evidence in the room, and no reason to believe that some confederate might dispose of evidence in the room. Is the search valid?

Change the facts slightly. Dan is in the driver's seat of a car when arrested, then cuffed and locked in the patrol car. May Copp now return to Dan's car and search it—with no warrant, no probable cause to believe the car contains evidence of a crime, and no danger that the car will be driven off?

Until recently, many courts have answered “yes” to both questions—solely because the search occurred soon after an arrest and near the place of arrest.¹ Several commentators (including this one) have objected to these results, with little effect.

Now, however, *Arizona v. Gant* offers some hope that reason will replace dogma as the basis of the search-incident-to-arrest doctrine, and put some sensible limits on its scope.²

I. IN THE BEGINNING: *CHIMEL*

The trouble started with a landmark case, *Chimel v. California*,³ which is generally known for its careful reasoning.⁴

* Professor of Law, Golden Gate University. This article is adapted from the James Otis Lecture, delivered by Professor Moskowitz at the University of Mississippi School of Law in November of 2008.

¹ See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1719 n.3 (2009).

² *Gant*, 129 S. Ct. 1710.

³ *Chimel v. California*, 395 U.S. 752 (1969).

⁴ I summarized *Chimel* more thoroughly in Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 658-62 (2002).

Chimel held that an arrest justifies a warrantless search because the arrest might cause the arrestee to attack the arresting officer or dispose of evidence.⁵ These two justifications limit the *scope* of the search to areas in which the arrestee might reach for a weapon or evidence. These justifications permit the officer to search the clothing worn by the arrestee, but not the area beyond where he might reach or lunge. So far, so good—this limitation on scope fits perfectly with the Court's justifications for this exception to the search warrant "requirement." But the Court also indicated that the justifications allow the police to search *within* the lunge area.⁶ Therein lies the problem.

The Court assumed that the police arrest Dan while he is standing on a certain spot, then calculate the area into which he might reach, and—while Dan stands on that spot—search that area (including the insides of any drawers or other containers within that area). It never occurred to the Court that—in the real world—Dan will be nowhere near the spot of arrest when *the search* occurs. Immediately after arresting Dan, the police will usually handcuff him, remove him from the spot, and lock him in their patrol car. But then—relying on *Chimel's* dictum—might return to the spot and search the lunge area.⁷

Since *Chimel*, most lower courts *have not cared* that Dan is no longer at the spot of arrest when the police search the lunge area—the search of that area is fine even if Dan is long gone. The Supreme Court has spoken, and that's good enough for them. If pressed, some courts would concoct a new rationale for this strange stretch of the *Chimel* rationale. For example, the police were justified in removing Dan from the spot for their own safety, so they should not forfeit their "right" to search the area without a warrant.⁸

None of this made any sense to me, but my job nevertheless compelled me to explain it to a pack of wide-eyed, innocent law students year after year. I found myself embarrassed by the judicial system I was urging my pupils to respect. What to do?

⁵ *Chimel*, 395 U.S. at 762-63.

⁶ *Id.* at 763.

⁷ *Id.*

⁸ See, e.g., *United States v. Turner*, 926 F.2d 883 (9th Cir. 1991).

Maybe I could shake up the courts by *proving* to them that *Chimel's* premise was simply wrong: cops do *not* let Dan stand there while they search the area.

So I did a study. I asked police departments around the country what they tell their officers to do with the suspect after an arrest. The response was pretty much unanimous: "Cuff him and get him out of there." I reported my findings in a law review article.⁹ Unlike most articles, this one seemed to have some effect on the Supreme Court. The mental meanderings of law professors only occasionally influence the Court, but the Justices pay more attention to *facts* shown by empirical research.

More on that later. First, let's review the effect of *Chimel's* mistake on *car searches*.

II. CAR SEARCHES—*BELTON & THORNTON*

In *New York v. Belton*, the arrestee was outside his car when he was arrested, along with his three passengers.¹⁰ The officer then searched the car, finding cocaine in the pocket of a black leather jacket on the back seat.¹¹

The situation was unusual. The single officer was outnumbered by the four detainees, and he might not have had room for all of them in his patrol car. So he left them where they were when they were arrested, and probably called for back-up to help take them in. Applying *Chimel's* logic, the Court should have *allowed* the officer to search the lunge area, which may—or may not—have included the back seat of the car and the jacket pocket.

But—held the Court—why bother with all this work, when a single "bright line" rule will do the trick: arrest a "recent occupant" of a car, and you can *automatically* search the entire passenger compartment and all containers that happen to be there. Why? Largely because "articles inside the relatively narrow compass of the passenger compartment of an automobile

⁹ Moskowitz, *supra* note 4, at 663-70.

¹⁰ *New York v. Belton*, 453 U.S. 454 (1981).

¹¹ *Id.* at 456.

are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]'.¹²

My study showed that this premise was pretty far off the mark. Articles in the passenger compartment are *not* generally within the area an arrestee might grab, because when the search occurs, the arrestee is almost always firmly sequestered in the back of the patrol car.¹³

Dissenting in *Belton*, Justice Brennan protested that this "single familiar standard" was at odds with *Chimel's* case-by-case approach.¹⁴ A plethora of professors agreed with Brennan, to no avail.¹⁵

In *Thornton v. United States*, the Court reaffirmed *Belton's* broad rule.¹⁶ While driving an unmarked police car, Officer Nichols learned that Thornton was driving a car whose tags did not match the car to which the tags had been issued. Thornton parked and left the car. Nichols "accosted" Thornton, who consented to a search of his person, which revealed marijuana and cocaine.¹⁷ Nichols arrested Thornton, handcuffed him, and placed him in the patrol car. The officer then searched Thornton's car, finding a handgun.¹⁸

Chief Justice Rehnquist's plurality opinion held that the search of the car was incident to the arrest and therefore valid.¹⁹ Thornton had argued that because the officer in *Belton* had "initiated contact" with the suspects while they were *in* the car, the police may search the car incident to arrest of a recent occupant only where this fact is present.²⁰ But in *Thornton*, Rehnquist's opinion held that this fact played no role in the *Belton* opinion.²¹

¹² *Id.* at 460 (citation omitted).

¹³ Moskowitz, *supra* note 4, at 675-76.

¹⁴ "When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel's* limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband." *Id.* at 465-66 (Brennan, J., dissenting).

¹⁵ See *Gant*, 129 S. Ct. at 1716.

¹⁶ *Thornton v. United States*, 541 U.S. 615 (2004).

¹⁷ *Id.* at 617-18.

¹⁸ *Id.*

¹⁹ *Id.* at 619.

²⁰ *Id.* at 620-21.

²¹ *Id.*

Therefore, "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle."²² Why? "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated."²³

Thus, *Thornton* confirms the *Belton* rule: A police officer may search the car of a "recent occupant" incident to arrest even if the suspect is nowhere near the car when the search takes place—for "officer safety" and to prevent destruction of evidence. This, I believe, is ridiculous. Neither of these dangers is in fact present if the suspect is nowhere near the car when the search occurs.

Justice Scalia concurred. He rejected three arguments that tried to squeeze the search into *Chimel's* justifications.²⁴

First, in this case, could Thornton himself—at the time of the search—have reached into the car for a weapon or evidence? No. Unless Thornton was "possessed of the skill of Houdini and the strength of Hercules,"²⁵ the likelihood was minimal that he could have wriggled out of his handcuffs, leapt out of the squad car, and reached into his own car for a weapon or evidence—all before Officer Nichols could stop him. If such a danger was substantial, then there was an equal likelihood that *Chimel* could have escaped his captors and run upstairs to grab a weapon or evidence—but the Court in *Chimel* refused to allow a search of the upstairs incident to the downstairs arrest.²⁶

Second, should there be a general rule "entitling" the police to search a car incident to a valid arrest? No, the Fourth Amendment is not a game where the police "win" the right to search. Warrantless searches must be justified by some identified need.

Third, is *Belton's* general rule justified by dangers generally occurring in the real world, so a general rule permitting such

²² *Thornton*, 541 U.S. at 617.

²³ *Id.* at 622-23.

²⁴ *Id.* at 625-29 (Scalia, J., concurring).

²⁵ *Id.* at 626 (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973)).

²⁶ *Chimel*, 395 U.S. at 768.

searches should apply even in a small minority of cases where those dangers are *not* present? No, in the real world there is usually *no* danger, because police are trained to get the arrestee away from the car before searching. Justice Scalia cited my study to support this last point.²⁷

According to Scalia, *Belton's* rationale is wrong, but not its *rule*—at least in part.²⁸ Apparently impelled somewhat by *stare decisis*, Scalia would not overrule *Belton* but would instead “re-cast” the case with a *new* rationale (never mentioned in *Belton* itself): “the car might contain evidence relevant to the crime for which he was arrested.”²⁹ Why? Scalia harks back to a couple of pre-Chimel cases³⁰ that justified area searches incident to arrest by “a more general interest in gathering evidence relevant to the crime for which the suspect has been arrested.”³¹ Scalia re-justifies this basis:

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.³²

But so what? If there is no danger that the arrestee (or someone else) might remove this evidence before the officer can obtain a search warrant, why not require the officer to go through the usual procedure of presenting his justification to a magistrate first? Scalia might have (but did not) invoked the reasoning of cases endorsing the “automobile exception” to the warrant requirement. In *United States v. Chadwick*, for exam-

²⁷ *Thornton*, 541 U.S. at 628 (citing Moskowitz, *supra* note 4, at 665-66).

²⁸ *Id.* at 629.

²⁹ *Id.*

³⁰ *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947).

³¹ *Thornton*, 541 U.S. at 629.

³² *Id.* at 630.

ple, the Court held that because of the low (but not non-existent) expectation of privacy in a car, if the officer has probable cause to believe there is evidence of a crime in parts of a car, the officer may search those parts.³³ He needs no search warrant and no exigent circumstances preventing him from getting a warrant before the evidence might be removed or destroyed.³⁴ This low expectation of privacy also supports Scalia's new rule, arguably—at least insofar as it applies to car searches incident to arrest.

Has Scalia's new rule added anything to the automobile exception? That is, are there circumstances where the automobile exception would not apply but Scalia's "recasted" Belton rule would authorize the search? It seems so. Scalia would permit a search of an arrestee's car "where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."³⁵ If Scalia intended to add something to the auto exception (even though he failed to discuss that exception), then it must be this: "reasonable to believe" means something less than probable cause. Scalia must have intended this, because he never uses the familiar term probable cause in his concurrence.

How much less? We get some hint from Scalia's application of his new rule to the facts of *Thornton*. Because Thornton was arrested for a drug offense, "It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest."³⁶

Was there *probable cause* to believe there were drugs in the car? Well, Officer Nichols had found three bags of marijuana and "a large amount" of cocaine in Thornton's pockets when he arrested Thornton, and Thornton had just been driving the car.³⁷ So Thornton might well be a drug dealer, and he *might* have been storing more drugs in the car. But maybe he kept them all

³³ United States v. Chadwick, 433 U.S. 1 (1977).

³⁴ *Id.* at 22.

³⁵ *Thornton*, 541 U.S. at 632.

³⁶ *Id.*

³⁷ *Id.* at 618 (plurality opinion).

in his pockets. Probable cause? Tough question, but Scalia did not even bother to address it. Pretty strong evidence that Justice Scalia did *not* mean to equate "reasonable to believe" with probable cause.

I suspect that he meant "reason to believe" to mean something like the reasonable suspicion needed to justify a *Terry*-stop—more than a mere hunch, but less than probable cause.³⁸ If probable cause means something like a 51% chance that X is true, then reasonable suspicion means something like a 25% chance. That is probably what Scalia meant, and that is probably what future cases will hold.

Could the "reason to believe" flow from facts *other than* the nature of the crime for which the suspect was arrested? (Scalia does not address this.) I cannot see why not.

So why am I bothering to spend so much time on a concurrence? Well, *this* concurrence seemed very likely to command a majority of the Court, eventually, because Justice Ginsburg (from the left) signed on to Scalia's concurrence, and Justice O'Connor (from the center) wrote her own concurring opinion pretty much endorsing Scalia's.³⁹

And that is just what happened in *Gant*: the majority adopted the rule proposed by Scalia in *Thornton*.

III. ARIZONA V. GANT

Officers knew that a warrant had been issued to arrest Gant for driving with a suspended license.⁴⁰ They saw Gant drive into a driveway, then get out of his car.⁴¹ Officer Griffith was thirty feet from Gant when he called to Gant.⁴² They approached each other, meeting ten to twelve feet from Gant's car.⁴³ Griffith arrested Gant, handcuffed him, and locked him in the backseat of a patrol car.⁴⁴ Then they searched Gant's car,

³⁸ *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁹ *Thornton*, 541 U.S. at 624-25 (O'Connor, J., concurring in part).

⁴⁰ *Arizona v. Gant*, 129 S. Ct. 1710, 1715 (2009).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

finding a gun and cocaine in the pocket of a jacket on the back seat.⁴⁵

Was the search of the car valid? It depends whether *Belton* is still good law, or Scalia's new rule has now become the law. *Belton*'s general rule would clearly authorize the search, as *Gant* was a recent occupant⁴⁶ of the car and the arrest was valid.⁴⁷ Rehnquist's plurality opinion in *Thornton* would also authorize the search, as that opinion held that *Belton* applies whether or not the officer first initiated contact with the arrestee while he was in the car.⁴⁸ But Scalia's concurrence in *Thornton* would *not* authorize the search, because (1) *Gant* was out of reach of the car when the search occurred,⁴⁹ and (2) there was no "reason to believe" there was evidence of the crime for which *Gant* was arrested (driving with a suspended license) in the car.⁵⁰ So *Gant* presented the Court with a pretty clear choice: *Belton/Thornton* or Scalia? They chose Scalia—sort of.

Justice Stevens wrote the majority opinion. He conceded that *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search"—blaming Brennan's concurrence for this view of *Belton*.⁵¹ But that reading was wrong, says Stevens: "[W]e reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."⁵² This new rule comports with part of Scalia's concurrence in *Thornton*—and Stevens then adopts the rest of Scalia's concurrence, stating: "Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it

⁴⁵ *Id.*

⁴⁶ See *New York v. Belton*, 453 U.S. 454, 460 (1981).

⁴⁷ See *id.* at 457.

⁴⁸ See *Thornton v. U.S.*, 541 U.S. 615, 622 (2004).

⁴⁹ See *id.* at 625-27 (Scalia, J., concurring in part).

⁵⁰ See *id.* at 632.

⁵¹ *Gant*, 129 S. Ct. at 1718.

⁵² *Id.* at 1719.

is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"⁵³ Stevens goes on to distinguish *Belton* on its facts, noting that *Belton* involved a single outnumbered officer while here the arresting officers outnumbered Gant, and *Belton* was arrested for a drug offense (so there might be evidence of that offense in the car) while Gant was arrested only for driving with a suspended license.⁵⁴

If *Belton* did not establish a "bright line rule" permitting automatic searches of cars incident to the driver's arrest, should the Court now adopt such a rule? No, says Stevens, because the threat to privacy is too great. While one has a *diminished* expectation of privacy in a car, it is not a *zero* expectation. And *Belton* permits police to search other, *more* private containers found in the car—such as purses and briefcases.⁵⁵ No general rule is needed because the majority's revamped reading of *Belton* protects against the arrestee's use of weapons and destruction of evidence, and other doctrines permit car searches in related situations: where a passenger poses a danger, and where there is probable cause to believe there is evidence in the car.⁵⁶

Once again, Justice Scalia concurred. Since the majority opinion adopts pretty much his entire position in his *Thornton* concurrence, he is pretty satisfied with it—except for its revisionist view of *Belton*.⁵⁷ Scalia says *Belton* cannot be distinguished on its facts, because *Belton* did not care about the facts—the case applied a general rule. That general rule is wrong, so *Belton* (and *Thornton*) should simply be overruled.⁵⁸

Justice Alito dissented, joined by Roberts, Kennedy, and (in part) Breyer. Alito claims that the majority *did* in fact overrule *Belton* and *Thornton* because—as Scalia also said—those cases applied a general rule, not dependent on the specific facts of the case, and application of that general rule to the facts of *Gant*

⁵³ *Id.* at 1719 (quoting *Thornton*, 514 U.S. at 632 (Scalia, J., concurring)).

⁵⁴ *Gant*, 129 S. Ct. at 1719.

⁵⁵ *Id.* at 1720.

⁵⁶ *Id.* at 1721.

⁵⁷ *Gant*, 129 S. Ct. at 1724-25 (Scalia, J., concurring).

⁵⁸ *Id.*

would compel a result opposite to the one reached by the majority.⁵⁹ So far, I agree.

Alito then argues that *Belton's* general rule should be retained, because of *stare decisis*.⁶⁰ There is no "special justification" for refusing to follow a decided case, for several reasons.⁶¹ First, the police *relied* on the *Belton* rule, because that rule has been taught to the police in their training programs.⁶² (Not too persuasive, in my view. Just change the training regimen, at the cost of a few bucks to update the materials—which are updated anyway, to reflect new cases.) Second, no circumstances have changed since *Belton* was decided, because "surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence."⁶³ If the *Belton* majority considered these circumstances in adopting the general rule, then all the *more* reason they were dead wrong. Third, Alito says that the *Belton* rule is not unworkable as, apart from determining whether the occupant was recent, the rule is relatively easy for the police to apply in most situations. However, it would be even more workable to have a rule that allows the police to search wherever they like if they first say "Mother may I," so long as one has no concern for the privacy interests protected by the Fourth Amendment. The *Belton* rule is not much better than this formulation. Fourth, *Belton* has not been undermined by subsequent cases.⁶⁴ (This time he's right—look at *Thornton*.) Finally, Alito defends *Belton's* reasoning: it represents "only a modest—and quite defensible—extension of *Chimel*."⁶⁵ Here's where things get interesting.

Alito says that while *Chimel* limited searches-incident-to-arrest to the arrestee's grab area, the opinion failed to specify whether this area is to be measured at the time of the arrest or

⁵⁹ *Id.* at 1726-27.

⁶⁰ *Id.* at 1727-31 (Alito, J., dissenting).

⁶¹ *Id.* at 1728.

⁶² *See id.*

⁶³ *Gant*, 129 S. Ct. at 1729.

⁶⁴ *Id.*

⁶⁵ *Id.*

the time of the search—"but unless the *Chimel* rule was meant to be a specialty rule, applicable to only a few unusual cases, the Court must have intended for this area to be measured at the time of arrest."⁶⁶ Why? Because usually the cop immediately handcuffs the arrestee and gets him away from the area of arrest for officer safety.⁶⁷ For support, Alito cites my study!⁶⁸

Normally, I am happy as a clam when a judge cites one of my articles. But this Justice uses my piece to support a conclusion *opposite* to the one I reached! Alito says that because "[h]andcuffs were in use in 1969" when *Chimel* was decided, the *Chimel* Court must have *known* that cops usually secure the arrestee before searching.⁶⁹ Therefore, when the Court said the police may search the "grab area", the Court *must* have intended to authorize the police to search that area *even after the arrestee is secured*.⁷⁰

My conclusion was quite different.⁷¹ I said that *Chimel's* scribbling about a search of the grab area was only a dictum because the *issue* before the Court in *Chimel* was the admissibility of evidence found *well outside* the grab area.⁷² A dictum is worth less than a holding because the facts of the case do not force the court to think carefully about what they are saying, and therefore they make mistakes. That is exactly what happened in *Chimel*. The *Chimel* Court simply missed the boat on grab area because its attention was focused on overruling prior cases that had permitted the police to search *the entire house*. The mistake in *Chimel* led to the mistakes in *Belton* and *Thornton*, which the *Gant* majority finally corrected.

And that leads to the most interesting question: will *Gant* lead to correction of the *Chimel* mistake? Alito saw the problem. *Belton* was based on the *Chimel* dictum, which Alito assumes was right and I believe was wrong.⁷³ Because *Gant* effec-

⁶⁶ *Id.* at 1730.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Gant*, 129 S. Ct. at 1730.

⁷⁰ *Id.*

⁷¹ Moskovitz, *supra* note 4, at 660.

⁷² *Id.*

⁷³ *Gant*, 129 S. Ct. at 1730.

tively overrules *Belton*, Alito says “if we are going to reexamine *Belton*, we should also reexamine the reasoning in *Chimel* on which *Belton* rests.”⁷⁴ I agree. Alito also says, “there is no logical reason why the same rule should not apply to all arrestees.”⁷⁵ Again, I agree. Let’s do it right in all cases, not just cases involving car searches. But I disagree with Alito’s conclusion. All arrestees should *not* have their homes and cars searched incident-to-arrest when there is no danger they could reach those places.

IV. THE FUTURE: CAR SEARCHES

The majority opinion in *Gant* authorizes the police to search the arrestee’s car “incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”⁷⁶ That standard should be pretty easy to apply, as courts have had a lot of experience dealing with the arrestee’s reaching distance, or “grabbable area,” at the time of *arrest*.⁷⁷ Courts need only apply those same criteria to where the arrestee was at the time of the *search*. As the Court indicates, the issue will rarely arise because the police will almost always secure the guy and get him away from his car before they search it.⁷⁸

The majority in *Gant* also allows the police to search the arrestee’s car when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁷⁹ This is a new rule, and it needs elaboration. What does “reasonable to believe” mean? We’ve seen probable cause, and we’ve seen reasonable suspicion. Is “reasonable to believe” something new, different from these two familiar standards? I doubt it. I expect courts to equate “reasonable to believe” with the reasonable

⁷⁴ *Id.* at 1731.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1719.

⁷⁷ *See, e.g.,* State v. Robalewski, 418 A.2d 817 (R.I. 1980).

⁷⁸ *Gant*, 129 S. Ct. at 1719.

⁷⁹ *Id.* (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

suspicion standard applied regularly to *Terry* stops.⁸⁰ It is hard enough to make a non-lawyer police officer tell the difference between probable cause and reasonable suspicion. It is not fair to saddle the officer with the burden of understanding a *third* standard, knowing where it fits with the other two, and then requiring the officer to *apply* that new standard to a new, unique set of facts with only a few seconds of thought and no legal opinion from some deputy DA or magistrate to guide him. And, since he has no search warrant, his good faith effort to apply this new standard will not protect him from suppression of the evidence if he gets it wrong.⁸¹ It's just too much, and I doubt that the courts will impose such a burden on him.

I expect courts to apply the "reasonable to believe" standard on a case-by-case basis, just as they do when assessing the validity of a *Terry*-stop. It is possible, however, that courts might decide that certain *categories* of "offenses of arrest" *always* justify a search of the car. For example, a person arrested for selling narcotics will often have drugs nearby in his car, so why not make it easy on the police by establishing a *general rule* permitting a search of the car without further facts indicating that there is evidence of sales in the car? Or does this hark back to *Belton's* now-disapproved general rule? We will see.

Justice Alito raises another issue: "[W]hy is this type of search restricted to evidence of the offense of arrest?"⁸² Good question. I can't see why it should be so restricted. The only justification for reducing the cause needed to search the car below probable cause is the reduced expectation of privacy one has in a car. If the officer has reasonable suspicion from *any* source for believing there is evidence of a crime in the car, the *Gant* majority's logic should allow him to search the car.

Alito also asks "why an evidence-gathering search incident to arrest should be restricted to the passenger compartment."⁸³

⁸⁰ See, e.g., *Hiibel v. 6th Jud. Dist. Ct. of Nev. Humboldt County*, 542 U.S. 177 (2004); *United States v. Sharpe*, 470 U.S. 675 (1985).

⁸¹ See *United States v. Leon*, 468 U.S. 897 (1984).

⁸² *Id.* at 1731.

⁸³ *Id.*

Another good question. That restriction is an artifact of *Belton*, which seemed to “reason” as follows:

(1) *Chimel* allowed a search of the area around Dan at the time of arrest;

(2) If Dan were in the car when arrested, he could then reach into any place or container in the passenger compartment, but not into the trunk;

(3) We now extend *Chimel* to the arrest of a “recent occupant”, so we will hypothetically put him *back* into the car and assume he was arrested there; and so (4) *Voila*, the officer can search the passenger compartment but not the trunk. Very strange “logic.”

As *Gant* changes the rule and the rationale, the scope of the allowable search should change too. Under the auto exception, the Court assumes that the lowered expectation of privacy in a car applies to the entire car, so if the officer has probable cause to believe there is evidence in the trunk, he may search the trunk without a warrant.⁸⁴ (I do not necessarily agree with this, as people tend to store private things in a trunk more often than they store them in the passenger compartment. But the Court has spoken.) As I said above, I think *Gant* allows a search of a car if the officer has reasonable suspicion to believe there is evidence of a crime in the car—because of that same lowered expectation of privacy in a car. If that lowered expectation permits a search of the trunk under the auto exception, it should permit a search of the trunk under the *Gant* exception too.

Will *Gant* lead to a change in the auto exception? Maybe. The auto exception is one strange animal. It started, I believe, simply as an application of the “probable cause + exigent circumstances” exception to the search warrant requirement. The Fourth Amendment generally requires probable cause, and the Court generally requires the officer to seek out a magistrate to issue a search warrant—unless exigent circumstances prevent the officer from getting a warrant before the evidence is destroyed, hidden, or carried away. The auto exception evolved into a separate category because usually the fact that the evi-

⁸⁴ See *United States v. Ross*, 456 U.S. 798 (1982).

dence is in a car means that it can be driven away by someone before the officer can obtain a warrant; thus the car provides the exigent circumstances. But not always. Sometimes the car is disabled or there is no one to drive it away. Even in these cases, however, the Supreme Court upheld the search.⁸⁵ The Court finally explained these anomalies by finding a *different basis* for the exception. In *United States v. Chadwick*,⁸⁶ the Court said that the auto exception is based not on the car's inherent mobility, but on the lowered (but not non-existent) expectation of privacy in a car.

Fine, but what test *should* be applied to car searches? Why probable cause, and not mere reasonable suspicion? Probable cause is required for an arrest. A *Terry*-stop intrudes on an expectation of liberty *lower* than an arrest, so we don't require probable cause for a *Terry*-stop—only reasonable suspicion is required. By like reasoning, only reasonable suspicion should be required for a car search, where a lower expectation of privacy also attaches. Justice O'Connor made a similar proposal in her dissenting opinion in *Arizona v. Hicks*.⁸⁷ The majority held that the police could look under a stereo in a home only if they had probable cause to believe there was evidence beneath the stereo. O'Connor assumed that this intrusion on privacy was enough to constitute a "search," but felt the intrusion was so low that reasonable suspicion (the *Terry* standard) should be enough to justify "a cursory examination of an item in plain view."⁸⁸ She noted that the intrusion in *Terry* (a forcible stop) was much more intrusive on privacy than moving the stereo a few inches. The same reasoning would seem to apply to the search of a car, given the Court's "low expectation of privacy" rationale for the auto exception.

But no. The Court in *Chadwick* stuck to the old test for the auto exception: probable cause. Why? Probably from some sense of deference to *stare decisis*. The Court wanted to clarify

⁸⁵ See, e.g., *Cady v. Dombrowski*, 413 U.S. 433, 436 (1973) (car disabled as result of an accident); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (search conducted while car at police station and occupants in custody).

⁸⁶ *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977).

⁸⁷ *Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (O'Connor, J., dissenting).

⁸⁸ *Id.* at 334.

the *basis* for the rule, but preferred not to tinker with the rule itself.

But *Gant* has changed the picture. Car searches now are *permitted* on mere reasonable suspicion—at least right after an arrest and where the reasonable suspicion is connected to “the offense of arrest.”⁸⁹ But why these limitations? How does the fact of arrest affect the driver’s or owner’s lowered expectation of privacy in the car? Not much. One is just as troubled (or not troubled) by an officer’s search of one’s car whether one has been arrested or not. Scalia, however, believes that the arrest *does* matter, as it “distinguishes the arrestee from society at large,” and “it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.”⁹⁰ Well, it will be “illogical” in some situations, and the “reasonable to believe” test should be adequate to distinguish the logical from the illogical.

The upshot of all this: if the Court gets around to deleting these restrictions, it might as well use its resulting new rule to replace (or redefine) the auto exception with a revamped *Gant* exception. The *Gant* majority characterized its new rule as a revised *Belton* rule. *Belton* placed its rule under the search-incident-to-arrest exception. The *Gant* majority opinion approved of *Belton*, so it looks like a revised *Belton* rule, belonging under the search-incident-to-arrest doctrine. But it really *does* not belong under that exception because only rarely will *Chimel’s* justifications underlying the search-incident-to-arrest exception apply to searches of a car incident to an arrest (because the arrestee will almost never be able to reach the car for weapons or evidence when the officer searches the car).

Instead, the guts of *Gant* are its *new* rule permitting the officer to search the car when it is “reasonable to believe” there is in the car evidence of the “offense of arrest.” So the focus is now on the likelihood that there is evidence of a crime in the car—which is exactly the focus of the auto exception. There is not much need for both, so I predict (speculate, actually) that when

⁸⁹ *Gant*, 129 S. Ct. at 1719.

⁹⁰ *Thornton*, 541 U.S. at 630.

the Supreme Court gets around to deleting or modifying the restrictions that Justice Alito criticized, the new "updated" *Gant* rule will displace the old auto exception.

V. CAR SEARCHES—SOME HYPOTHETICALS

Let's play with a few hypos.

1. Officer Copp stops Dan for speeding. Copp runs a warrant check, which brings up a warrant to arrest Dan for selling cocaine. The warrant says nothing about the date, place, or circumstances of the alleged cocaine sale. Copp handcuffs Dan and locks him in the patrol car. Does *Gant* allow Copp to search Dan's car for cocaine? I don't think so. Without more, what Copp knows does not make it "reasonable to believe" (in my view, this means reasonable suspicion) that Dan was selling cocaine out of his car or transporting it in his car.

2. Same facts, but when Copp searches Dan's clothes incident to the valid arrest on the warrant, Copp finds a pound of cocaine and \$10,000 in Dan's pockets. Now may Copp search Dan's car? Clearly he could do so under *Gant*, as Copp has plenty of reasonable suspicion to believe Dan might be transporting in the car "evidence of the crime of arrest" (sale of cocaine).

But Copp probably *doesn't need Gant* to justify the search. The sum of all these facts seems to add up to *probable cause* to believe there is evidence of cocaine sales in the car, so the *auto exception* authorizes the search.

3. Same facts as #1, but Copp finds only a small baggie of cocaine in Dan's pockets. May he search the car? Now the sum of the facts does *not* seem to add up to probable cause to believe there is evidence in the car, so the auto exception would not appear to work. But I think *Gant* would authorize the search, because the warrant for selling cocaine plus the discovery of the baggie of cocaine shows that Dan is regularly involved with cocaine and so there is at least a 25% chance (?) that there are more drugs, sales money, paraphernalia, etc., in the car.

May Copp search the *trunk*, or just the *passenger compartment*? Because the *Gant* majority did not overrule *Belton*, it seems that *Gant* authorizes Copp to search only the passenger compartment of Dan's car. Justice Alito has problems with this,

and so do I. As I indicated above, if *Gant*'s reasonable suspicion standard is justified by the lowered expectation of privacy one has in a car, that should justify a search of the trunk too.⁹¹

4. Copp stops Dan for speeding, and the warrant check shows a warrant for driving with a suspended license. Copp's search of Dan's clothing turns up a small baggie of cocaine and \$5,000. This is a tough one. I don't think this adds up to probable cause to believe there are more drugs or related items in the car (so the auto exception would not apply), but this might be enough for reasonable suspicion.

But this search would not be for "evidence of the crime of arrest,"⁹² so the *Gant* majority opinion would not seem to permit it. Justice Alito questioned this, and so do I, as indicated above.⁹³ It seems that this limitation on car searches incident to arrest was only dicta in *Gant*, so maybe the Court will reconsider it when the right facts come before it.

VI. THE FUTURE: HOME SEARCHES

As I said above,⁹⁴ I think the Court should reexamine the *Chimel* dictum allowing the police to search the "grabbable area" around the arrestee at the time of arrest—even though he is nowhere near that area at the time of the search. As my earlier study shows, police officers are instructed to get the guy secured and out of that area immediately after arrest—and that is what they usually do. There is no danger of any reach for weapons or evidence in that area, so no search should be allowed under the search-incident-to-arrest doctrine.

The logic of *Gant*'s majority opinion (and certainly Justice Scalia's concurrence) supports this analysis, and I predict that this is exactly what the Court will do when it accepts a case presenting these facts in a home search. That case will probably

⁹¹ The Court has extended the auto exception to include *containers found in* the car. *California v. Acevedo*, 500 U.S. 565 (1991). This goes too far, in my view, because your expectation of privacy in your suitcase found in your trunk is much higher than, say, a jacket found on your back seat.

⁹² *Gant*, 129 S. Ct. at 1719.

⁹³ See *supra* note 72 and accompanying text.

⁹⁴ See *supra* notes 6-8 and accompanying text.

resemble *United States v. Turner*,⁹⁵ where the police arrested Turner in a room and saw a gun next to him. They handcuffed him and took him out of the room. Then they returned and searched the room where the arrest took place, finding a rifle, ammunition, and cocaine.⁹⁶

The Court of Appeals upheld this search—even though Turner could not reach that room when the search occurred—because (1) the area searched was within Turner's reach when he was arrested, and (2) the decision to remove Turner from the room was justified by the officers' concern for their safety, as they had already found a gun near Turner when he was arrested.⁹⁷

In his *Thornton* concurrence, Justice Scalia rejected this sort of reasoning, stating:

[C]onducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful. If “sensible police procedures” require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search.⁹⁸

Scalia will find it pretty hard not to apply the same analysis to a home search. Indeed, the argument for limiting searches-incident-to-arrest in the home is *even stronger* than in a car, because the Court (including Justice Scalia) seems to go out of its way to protect the sanctity of the home.⁹⁹

Scalia convinced a majority in *Gant*, and I think he will do so again when a case like *Turner* hits the Court. Will the Court include the new wrinkle Scalia added in *Thornton* and adopted by the majority in *Gant*—allowing the police to search the grabbable area when it is “reasonable to believe” that the area contains “evidence of the crime of arrest”? I don't think so. While the recent justices have not enforced the Fourth Amendment nearly as much as earlier justices (e.g., on the Warren Court),

⁹⁵ 926 F.2d 883 (9th Cir. 1990).

⁹⁶ *Turner*, 926 F.2d at 885-86.

⁹⁷ *Id.*

⁹⁸ *Thornton*, 541 U.S. at 627 (Scalia, J., concurring).

⁹⁹ See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001); *Arizona v. Hicks*, 480 U.S. 321 (1987). Justice Scalia wrote the majority opinion in both of these cases.

they have been quite protective when it comes to home searches.¹⁰⁰ Permitting the police to search the home (the *entire* home?) on mere reasonable suspicion—without a warrant or exigent circumstances—merely because there was an arrest in the home goes much too far. The lower expectation of privacy in cars might justify this new *Gant* exception, but it would not seem to justify an intrusion on the privacy of the home. And, for good measure, we don't want to encourage the police to arrange home arrests in order to take advantage of a *Gant*-like exception.

CONCLUSION

We've come a long way. *Belton* (and *Thornton*) undermined the Fourth Amendment's protection of privacy by setting out a general rule that bore no resemblance to what the police usually do in the real world. *Gant* brought the Court back on the track of rationality and realism. There are still several kinks in the opinion that need straightening, but now that the Court is back on the road to reason, that shouldn't be too hard.

¹⁰⁰ See *supra* note 99 and accompanying text.

RECENT DECISION

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES BY SCHOOL OFFICIALS—FOURTH AMENDMENT GUARANTEES STUDENTS THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AT SCHOOL

I. FACTS

On October 8, 2003, Assistant Principal Kerry Wilson escorted Savana Redding, a thirteen-year-old middle school student, from her classroom to his office to search her for prescription-strength ibuprofen and over-the-counter naproxen.¹ Wilson asked Redding about the items found in a day planner that student Marissa Glines had with her in the classroom.² Redding told Wilson that she had given the day planner to Glines several days before but was not aware of any of the items it contained.³ Wilson then revealed the prohibited ibuprofen and naproxen he received from student Jordan Romero and found on Glines's person.⁴ In response to Wilson's questioning, Redding denied

¹ Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2638 (2009). Wilson was following up on a tip he had received from Marissa Glines, a friend of Redding's. *Id.* at 2640-41. A week prior, student Jordan Romero notified Wilson that some students had brought drugs and weapons to school and he had gotten sick after taking pills the received from a fellow student. *Id.* at 2640. On the morning of the search at issue, Jordan gave Wilson a pill that he received from Glines and notified him that the students intended to take the pills at lunch. *Id.* The school nurse, Peggy Schwallier, told Wilson the pill was prescription-strength ibuprofen. *Id.*

² *Id.* at 2638. Safford Middle School policy "strictly prohibit[ed] the nonmedical use, possession, or sale of any drug on school grounds." *Id.* at 2639-40. The policy included any over-the-counter or prescription drug, unless the use of the drug was permitted by school board policy. *Id.* Because of Jordan's tip, Wilson had searched Glines and a day planner located next to her in the classroom for ibuprofen in his office. *Id.* at 2640.

³ *Id.* at 2638. Wilson had found several knives, a cigarette, lighters, and a permanent marker in the day planner. *Id.*

⁴ *Id.* at 2638. In the presence of administrative assistant Helen Romero (unrelated to Jordan Romero), Wilson had instructed Glines to pull out her pockets and open her

knowing about the pills and handing them out to her fellow students; thus, she allowed Wilson to search her backpack.⁵ Administrative assistant Helen Romero and Wilson searched her backpack and found no pills.⁶

After finding no pills in Redding's backpack, Wilson directed Romero and school nurse Peggy Schwallier to search Redding's clothes for pills in the school nurse's office.⁷ Romero and Schwallier did not find any pills in the outer layers of Redding's clothes; therefore, they asked her to remove her outer garments down to her bra and underwear.⁸ Next, they directed Redding to pull her bra out to the side and shake it and to pull out the elastic band on her underwear.⁹ The resulting search partially exposed her breasts and pelvic area, but they found no pills.¹⁰

In response, Redding's mother filed a 42 U.S.C. § 1983 action in the United States District Court for the District of Arizona against Wilson, Romero, Schwallier, and Safford Unified School District No. 1 ("Petitioners") alleging that the strip search of Redding violated her Fourth Amendment rights.¹¹ Claiming the defense of qualified immunity, the Petitioners filed a motion for summary judgment.¹² The district court granted the Petitioners' motion but on the ground that no Fourth

wallet. *Id.* at 2640. He found one over-the-counter naproxen, several prescription-strength ibuprofen, and a razor blade. *Id.* When questioned about the drugs, Glines told Wilson that she received the drugs from Redding. *Id.* Wilson did not ask Glines any additional questions specifically about Redding. *Id.* He then directed Romero and Schwallier to search Glines's bra and underpants, but the search revealed no additional pills. *Id.* At this point, Wilson pulled Redding out of class to follow up on the information he received from Glines. *Id.*

⁵ *Id.* at 2638.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* The Petitioners' motion argued that the strip search of Redding did not violate her Fourth Amendment rights; thus, without a constitutional violation, no further inquiry by the court was required. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1077 (9th Cir. 2008) (en banc), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

Amendment violation had occurred.¹³ On appeal, the Court of Appeals for the Ninth Circuit upheld the grant of summary judgment in favor of the Petitioners.¹⁴ On rehearing en banc, the Ninth Circuit reversed the decision and held that the strip search violated Redding's Fourth Amendment rights.¹⁵ The Ninth Circuit then utilized the test for qualified immunity and held that Redding's rights were "clearly established" at the time of Wilson's search, but not as to the search performed by Schwallier and Romero.¹⁶ Thus, Wilson was denied qualified immunity, but Schwallier and Romero's qualified immunity was affirmed.¹⁷

The United States Supreme Court granted certiorari and held: affirmed in part, reversed in part, and remanded.¹⁸ When

¹³ *Id.* The district court found for Petitioners solely on the basis that there was no violation of Redding's Fourth Amendment rights as established by *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). *Id.* The district court held that the necessity to find "the ibuprofen was sufficiently urgent that the strip search was 'reasonably related' to the search's objective and was not 'excessively intrusive.'" *Id.* at 1078 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)). The district court's conclusion rendered the decision on qualified immunity unnecessary. *Id.*

¹⁴ *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 836 (9th Cir. 2007), *rev'd en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

¹⁵ *Redding*, 531 F.3d at 1089. The Ninth Circuit followed the two-step process for deciding claims of qualified immunity, pursuant to *Saucier v. Katz*, 533 U.S. 194, 200 (2001). *Id.* at 1078. In the first step of the process, the Ninth Circuit concluded that the strip search of Redding was unjustified and unreasonable in scope under the Fourth Amendment test for searches of students by school officials as set out in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *Redding*, 531 F.3d at 1081-87.

¹⁶ *Id.* at 1089. In applying the second step of the process for deciding claims of qualified immunity, the Ninth Circuit held that the "notions of personal privacy [were] 'clearly established' in that they inhere[d] in all of us, particularly middle school teenagers, and [were] inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches." *Id.* at 1088-89 (quoting *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489, 499 (6th Cir. 2008)).

¹⁷ *Id.* at 1089. Romero and Schwallier were merely following Wilson's instructions; therefore, they were granted qualified immunity because they did not act as "independent decision-makers." *Id.*

¹⁸ *Redding*, 129 S. Ct. at 2637. Most significantly, eight members of the Court affirmed that the strip search was a violation of Savana Redding's Fourth Amendment rights, while Justice Thomas dissented. *Id.* The Court reversed the Ninth Circuit's decision to deny Assistant Principal Wilson qualified immunity by a vote of 7-2 with Justices Stevens and Ginsburg dissenting, while all Justices affirmed the decision to grant Romero and Schwallier qualified immunity. *Id.* In addition, the Court remanded the issue of liability of petitioner Safford School District, which was not addressed by the Ninth Circuit. *Id.* at 2644. Justice Souter delivered the opinion of the Court and

a school official conducts a strip search of a student based upon a suspicion that the student has violated the school policy prohibiting the possession of prescription drugs and the official does not reasonably suspect danger or that the student has resorted to her underwear to hide the drugs, the search is unreasonable and excessively intrusive in violation of the student's Fourth Amendment rights.¹⁹

II. RELATED LAW

A. Fourth Amendment Jurisprudence

The Fourth Amendment of the United States Constitution provides the following in pertinent part:

[T]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁰

Generally, probable cause exists in the law enforcement setting when "facts and circumstances" known to a police officer and based on "reasonably trustworthy information" would warrant a person of "reasonable caution in the belief that an offense has been or is being committed."²¹ Further, the officer should reasonably believe that the search will yield evidence related to the suspected offense.²²

was joined by Justices Scalia, Kennedy, Breyer, Alito, and Chief Justice Roberts; Justices Stevens and Ginsburg joined as to Parts I-III. *Id.* at 2637. Justice Stevens wrote an opinion concurring in part and dissenting in part, in which Justice Ginsburg joined. *Id.* Also, Justice Ginsburg wrote an opinion concurring in part and dissenting in part. *Id.* Finally, Justice Thomas wrote an opinion concurring in part and dissenting in part. *Id.*

¹⁹ *Redding*, 129 S. Ct. at 2641-44.

²⁰ U.S. CONST. amend. IV.

²¹ *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) ("In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925))).

²² *Id.*

The Court has used different factors to decide what constitutes reliable knowledge to justify a finding of probable cause.²³ However, because such factors do not strictly control,²⁴ the Court views probable cause principles as “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.”²⁵ Particularly, in *New Jersey v. T.L.O.*, the Court held that a standard less than probable cause was necessary in searches of students conducted by school administrators; in effect, the case narrowed students’ Fourth Amendment rights when they were on school grounds.²⁶

B. *New Jersey v. T.L.O.*

In *New Jersey v. T.L.O.*, the Court considered the scope of a student’s Fourth Amendment rights in a school setting for the first time.²⁷ Public school student T.L.O. and a classmate were caught smoking in the bathroom in violation of school policy.²⁸ The teacher who caught the students escorted them to the principal’s office.²⁹ T.L.O. denied the allegation, while the other student admitted to smoking in the bathroom.³⁰ The assistant principal searched her purse and found cigarettes and rolling

²³ See, e.g., *Adams v. Williams*, 407 U.S. 143, 148-49 (1972) (holding that knowledge is reliable when the degree of known facts implies unlawful actions and is then further corroborated by the existence of facts provided by an informant, thus constituting probable cause); *Spinelli v. United States*, 393 U.S. 410, 416-19 (1969) (considering the particularity of the information received to hold that the information was not reliable to constitute probable cause); *Aguilar v. Texas*, 378 U.S. 108, 114-16 (1964) (deciding that an unidentified informant’s information was not credible or reliable enough to meet the requirements for probable cause).

²⁴ *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983) (holding that while “an informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’ were all relevant in determining the value of the informant’s report, the elements should not be “rigidly” applied in every case).

²⁵ *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (citing *Gates*, 462 U.S. at 232). See also *Brinegar*, 338 U.S. at 175 (“The standard of proof [for probable cause] is . . . correlative to what must be proved.”) Therefore, the best distinction might be that prior to conducting an evidence search, a law enforcement officer must have knowledge that raises a “fair probability” or a “substantial chance” of finding evidence of unlawful conduct. *Gates*, 462 U.S. at 238.

²⁶ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

²⁷ *Id.*

²⁸ *Id.* at 328.

²⁹ *Id.*

³⁰ *Id.*

papers commonly associated with marijuana use.³¹ Concerned about illegal drug possession, the assistant principal proceeded with a more intrusive search deeper into the purse and found marijuana, a pipe, plastic bags, a large amount of money, and documents implicating the student in marijuana dealing.³² The school administration turned over the evidence found in the search to the police, who then brought delinquency charges against T.L.O. in juvenile court.³³

At trial, T.L.O. claimed the assistant principal's search violated her Fourth Amendment rights and moved to suppress the evidence found in her purse.³⁴ The juvenile court, finding no Fourth Amendment violation, denied her motion to suppress, and the appellate division affirmed the ruling.³⁵ However, instead of applying the probable cause standard to the Fourth Amendment challenge of the search, the New Jersey Supreme Court found the search unconstitutional under a more relaxed, "reasonable suspicion" standard which the court held should apply to searches of students by school administrators.³⁶ The United States Supreme Court granted certiorari and accepted the "reasonable suspicion" standard; however, in applying the standard, the Court reversed the lower court's decision and held that the search of T.L.O.'s purse was constitutional.³⁷

In *T.L.O.*, the Court reached two relevant conclusions. First, the doctrine of *in loco parentis* was not appropriate in the school setting because school officials were government agents subject to the Fourth Amendment when searching students at

³¹ *Id.*

³² *Id.*

³³ *Id.* at 328-29.

³⁴ *Id.* at 329.

³⁵ *Id.* at 329-30.

³⁶ *Id.* at 330-31. The New Jersey Supreme Court concluded that searches of students by school officials did not violate the Fourth Amendment if "the official ha[d] reasonable grounds to believe that a student possesse[d] evidence of illegal activity or activity that would interfere with school discipline and order." *Id.* (quoting *State ex rel. T.L.O.*, 94 N.J. 331, 346 (1983)).

³⁷ *T.L.O.*, 469 U.S. at 331-33. The Court first granted certiorari on the issue of whether the exclusionary rule applied in a juvenile court proceeding; however, the Court later requested that the parties argue the issue of the Fourth Amendment's role in the school setting. *Id.* at 332. Upon issuing its holding, the Court expressly stated that it was not deciding on the exclusionary rule issue. *Id.* at 333 n.3.

school.³⁸ Second, that courts should use a balancing test to determine which Fourth Amendment elements govern searches of students and their personal belongings while in school.³⁹

The Court's decision to apply the general reasonableness interpretation of the Fourth Amendment to school searches was balanced against student privacy interests.⁴⁰ In delivering the opinion of the Court, Justice White emphasized the school's need to maintain order and discipline on school grounds and to preserve a healthy learning environment.⁴¹ The Court was particularly concerned with threats to order and the learning process arising from the presence of contraband at schools.⁴² Therefore, the Court exempted school searches from the traditional Fourth Amendment principle that required probable cause before conducting a search.⁴³ The Court balanced the school's needs against a student's reasonable expectation of privacy.⁴⁴ In relation to a student's reasonable expectation of pri-

³⁸ *Id.* at 334-37. *In loco parentis* means "in the place of a parent," and prior to *T.L.O.*, some courts applied this doctrine and suggested that school officials acted "in the place of a parent" during school hours and were not inhibited by the Fourth Amendment when conducting searches of students. *Morse v. Frederick*, 551 U.S. 393, 413-14 (2007) (Thomas, J., concurring). Under this doctrine, "the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order." *Id.* at 414 (citation omitted). The Court found the doctrine of *in loco parentis* to be "in tension with contemporary reality and the teachings of this Court." *T.L.O.*, 469 U.S. at 336. "In carrying out searches and other disciplinary functions . . . school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." *Id.* at 336-37. The Court argued that "public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 336.

³⁹ *T.L.O.*, 469 U.S. at 337.

⁴⁰ *Id.* at 337. In his concurring opinion, Justice Blackmun accepted the use of the balancing test in searches at school, but he emphasized that when analyzing the Fourth Amendment, balancing was the exception to the rule. *Id.* at 352-53 (Blackmun, J., concurring).

⁴¹ *Id.* at 339-40 (majority opinion).

⁴² *Id.* at 353 (Blackmun, J., concurring) ("The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement . . .").

⁴³ *Id.* at 341-42 (majority opinion).

⁴⁴ *Id.* at 338-40. See also *id.* at 339 ("In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason

vacy at school the Court found that "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, [was] undoubtedly a severe violation of subjective expectations of privacy."⁴⁵

The Court introduced a two-prong test to determine the reasonableness of a school search.⁴⁶ First, a court must determine whether the search "was justified at its inception," and, second, whether the actual search "was reasonably related in scope to the circumstances which justified the interference in the first place."⁴⁷ Ordinarily, a school official's search of a student was "justified at its inception" when reasonable grounds existed to suspect that a search would reveal evidence that the student had or intended to violate either the law or school policy.⁴⁸ The scope of a school search was permissible "when the measures adopted [were] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."⁴⁹ Applying this reasonableness test to the facts of the case, the Court con-

to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.").

⁴⁵ *Id.* at 337-38 (footnote omitted). The Court balanced student privacy interests with the school needs and came to a unanimous conclusion that school officials were excluded from the warrant requirement under the Fourth Amendment. *Id.* at 340. Justice White contended that obtaining a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools," thus, frustrating "the governmental purpose behind the search." *Id.* (citation omitted). The Court then decided that probable cause to perform a warrantless search at school was not necessary under normal circumstances by emphasizing that "the legality of a search of a student should depend simply on the reasonableness, under all circumstances, of the search." *Id.* at 340-41. Thus, "a careful balancing of governmental and private interests suggest[ed] that the public interest [was] best served by a Fourth Amendment standard of reasonableness that stop[ped] short of probable cause" *Id.* at 341.

⁴⁶ *Id.*

⁴⁷ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

⁴⁸ *Id.* at 341-42. See also *id.* at 346 ("But the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . .'" (quoting *Hill v. California*, 401 U.S. 797, 804 (1971))).

⁴⁹ *Id.* at 342.

cluded that the search of T.L.O.'s purse was constitutional under the Fourth Amendment.⁵⁰

C. Qualified Immunity and T.L.O.'s Progeny

When the Court rules on the issue of qualified immunity, if "clearly established law" fails to show how a search violated the Fourth Amendment, then the government official is entitled to qualified immunity.⁵¹ In *Saucier v. Katz*, the Court established a two-step protocol to follow when determining the validity of a government official's qualified immunity claim.⁵² First, a court must ask whether the facts show that the official's conduct violated a constitutional right.⁵³ Second, if a constitutional right was violated, the court then determines whether the constitutional right was "clearly established."⁵⁴

Recently, the Court's opinion in *Pearson v. Callahan* made the *Saucier* two-step protocol less restrictive.⁵⁵ Where *Saucier* required courts to confront the first prong of the analysis before addressing the second, the Court in *Pearson* ruled that "the *Saucier* protocol should not be regarded as mandatory in all cases."⁵⁶

⁵⁰ *Id.* at 343. In applying the reasonableness test to the facts of the case, the Court divided the events into two separate searches. *Id.* at 343-44. The search conducted for cigarettes was reasonable because the determination of whether T.L.O. had cigarettes on her person was relevant to the accusation that she had violated the no-smoking rule. *Id.* at 344-45. The Court utilized the teacher's accusation that T.L.O. had violated the no-smoking rule to sustain the reasonableness of the decision to search her purse. *Id.* at 345-46. The second, more intrusive search of her purse produced rolling papers, which, the Court contended, created a "reasonable suspicion" that T.L.O. had marijuana on her person; thus, the second search was also held to be valid. *Id.* at 347.

⁵¹ *Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009). For the law to be established clearly, "the very action in question" does not have to be previously held unlawful. *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Also, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citing *United States v. Lanier*, 520 U.S. 259 (1997)). See *supra* notes 15-16.

⁵² *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

⁵³ *Id.* at 201.

⁵⁴ *Id.*

⁵⁵ *Pearson*, 129 S. Ct. at 818.

⁵⁶ *Id.* The Court clarified its conclusion by stating that lower courts remained free to follow the *Saucier* procedure; however, those courts would now have the discretion to decide whether that procedure was worthwhile in particular cases. *Id.* at 821.

Although *T.L.O.* required school officials to restrict the scope of a school search according to age and sex of the student and the reason for the search, courts have split on how the standard should apply to strip searches.⁵⁷ Therefore, lower courts have also come to different conclusions regarding an official's qualified immunity after applying the *T.L.O.* two-step standard used to determine the reasonableness of school searches.⁵⁸

III. SAFFORD UNIFIED SCHOOL DISTRICT NO. 1 V. REDDING

A. *Majority Opinion*

In *Redding*, the Court addressed whether a student subjected to a strip search by school officials, who acted on a "reasonable suspicion" that the student had brought prohibited over-the-counter and prescription drugs to school, violated the Fourth Amendment.⁵⁹ The Court held that the strip search of Savana Redding violated her Fourth Amendment rights "[b]ecause there were no reasons to suspect the drugs presented a danger or were concealed in her underwear. . . ."⁶⁰ However, the Court held that the school official that directed the unconstitutional strip search was entitled to qualified immunity from liability because there was "reason to question the clarity with which the right was established."⁶¹

⁵⁷ See, e.g., *Williams v. Ellington*, 936 F.2d 881, 886-87 (6th Cir. 1991) (holding that a strip search of a high school student to find drugs was reasonable under the *T.L.O.* standard, despite the fact there was no suspicion that the drugs were concealed close to her body).

⁵⁸ See also *Thomas v. Roberts*, 323 F.3d 950, 953-55 (11th Cir. 2003) (granting qualified immunity to a police officer and teacher who conducted a strip search of a fifth grade class in search of a missing twenty-six dollars); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997) (en banc) (granting qualified immunity to a teacher and school counselor who conducted two strip searches of two eight-year old students in an attempt to find seven dollars stolen from a classmate) ("Faced with a series of abstractions . . . and a declaration of seeming deference to the judgments of school officials . . . it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion . . . [that] all reasonable educators standing in defendants' place should have known that their conduct violated a clearly established constitutional right.").

⁵⁹ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2637 (2009).

⁶⁰ *Id.*

⁶¹ *Id.* at 2637-38.

The Court began by discussing Fourth Amendment cases that defined the parameters of probable cause and clarified the knowledge element of probable cause.⁶² However, the Court adhered to the reasoning established in *T.L.O.* when it concluded that “[t]he lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing,” as opposed to a “fair probability” or a “substantial chance,” in the case of law enforcement officers.⁶³ Thus, the Court followed the more relaxed Fourth Amendment standard for school searches established in *T.L.O.* to test the reasonableness of the strip search of Redding.⁶⁴

The Court applied the two-part reasonableness test set out in *T.L.O.*⁶⁵ First, the Court validated the school’s drug policy that Redding was suspected of violating because “[w]hen the object of a school search [was] the enforcement of a school rule, a valid search assume[d] . . . the rule’s legitimacy.”⁶⁶ In addressing the first search of Redding, the Court found that the information Assistant Principal Wilson received from Glines was enough for him to suspect Redding of distributing pills; accordingly, this suspicion justified the search of Redding’s backpack and outer clothing.⁶⁷ Thus, the Court concluded the first search of Redding was “justified at its inception” and “not excessively intrusive.”⁶⁸

The Justices of the Court “part[ed] company” as to the reasonableness of Wilson’s instructions to extend the search to the point of requiring Redding to strip to her underwear and pull out her bra and underwear.⁶⁹ In regards to the second search, “both subjective and reasonable societal expectations of personal

⁶² *Id.* at 2639. See *supra* notes 20-25 and accompanying text.

⁶³ *Id.* (internal quotations omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13 (1983)). See *supra* notes 24-26 and accompanying text.

⁶⁴ *Id.* See *supra* notes 45-49 and accompanying text.

⁶⁵ *Id.* at 2639-43.

⁶⁶ *Id.* at 2640 n.1.

⁶⁷ *Id.* at 2641 (“If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person If Wilson’s reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making.”).

⁶⁸ *Id.*

⁶⁹ *Id.*

privacy" required distinct elements of justification beyond the reasons for the original search.⁷⁰ Emphasizing the minimal danger posed by the drugs in question, the Court found that Wilson's suspicions did not "match the degree of intrusion" because he had no reason to believe that students had been exposed to a large amount of drugs or pills.⁷¹ In other words, such an extensive search would require the "suspicion that it [would] pay off."⁷² The Court noted that the Fourth Amendment still restricted school officials regardless of the high level of deference afforded to the official's professional judgment.⁷³ With regard to Redding's Fourth Amendment rights, the Court made it apparent that a school official must reasonably suspect some danger or that the student has hidden evidence of wrongdoing in her undergarments before a search can reasonably make the "quantum leap" from outer garments and personal belongings to exposure of the student's intimate parts.⁷⁴ Thus, the Court placed such an intrusive search into a separate category that demanded "its own specific suspicions."⁷⁵

However, the Court reversed the Ninth Circuit's decision to deny Assistant Principal Wilson qualified immunity and affirmed the decision to grant Romero and Schwallier qualified immunity.⁷⁶ Despite *T.L.O.*'s reasonableness requirement, no "clearly established law" showed that the strip search violated the Fourth Amendment.⁷⁷ The Court determined that many well-reasoned lower court cases following the *T.L.O.* standard had arrived at different results which suggested that the state of the law was not clear; thus, the Court granted the school officials qualified immunity.⁷⁸ In addition, the Court remanded the

⁷⁰ *Id.* ("Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating."). The Court also emphasized that her age, along with the common detrimental emotional effects of such searches, intensified the intrusiveness of the search. *Id.* at 2641-42.

⁷¹ *Id.* at 2642. The Court added that Wilson could not have suspected that Redding was concealing the drugs in her underwear. *Id.*

⁷² *Id.* (emphasis added).

⁷³ *Id.* at 2643.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2644.

⁷⁷ *Id.* at 2643-44. See *supra* notes 51-56 and accompanying text.

⁷⁸ *Id.* at 2644. See *supra* notes 57-58 and accompanying text.

issue of the liability of Safford School District, which was not addressed by the Ninth Circuit.⁷⁹

B. Justice Stevens's Opinion, Concurring in Part and Dissenting in Part

Justice Stevens, joined by Justice Ginsburg, disagreed with the majority's decision to grant the assistant principal qualified immunity, while joining the majority on the decision to declare the strip search unconstitutional.⁸⁰ Justice Stevens reasoned that the unconstitutionality of the search was obvious; thus, in this case, the school officials responded to "clearly established law [with] clearly outrageous conduct."⁸¹ He contended that disagreement among the lower courts regarding the application of *T.L.O.* to strip searches did not signify lack of clarity in the law.⁸² He also argued that the Court charted "no new constitutional path;" rather, the Court merely applied the standard set out in *T.L.O.* to the facts of the present case to come to a conclusion.⁸³

C. Justice Ginsburg's Opinion, Concurring in Part and Dissenting in Part

Justice Ginsburg joined Justice Stevens in dissenting from the Court's decision to grant Assistant Principal Wilson qualified immunity, but she agreed with the majority that the strip search of Redding violated the Fourth Amendment.⁸⁴ Justice Ginsburg determined that qualified immunity was inappropriate in this case because of the standards "plainly stated" in *T.L.O.*, concluding that "Wilson's treatment of Redding was ab-

⁷⁹ *Id.*

⁸⁰ *Id.* (Stevens, J., concurring in part and dissenting in part).

⁸¹ *Id.* To further emphasize his point, Justice Stevens stated, "[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude." *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 382 n.25 (1985)).

⁸² *Id.* at 2644-45 (emphasis added). See also *id.* at 2645 ("[T]he clarity of a well-established right should not depend on whether jurists have misread our precedents.").

⁸³ *Id.* ("Our conclusion leaves the boundaries of the law undisturbed.").

⁸⁴ *Id.* at 2645-46 (Ginsburg, J., concurring in part and dissenting in part).

usive and it was not reasonable for him to believe that the law permitted it."⁸⁵

D. Justice Thomas's Opinion, Concurring in Part and Dissenting in Part

Justice Thomas agreed with the Court's judgment to allow the school officials qualified immunity; however, he was the lone dissenter on the issue of Redding's Fourth Amendment rights.⁸⁶ He argued that the Court should not interfere with the school's attempts to maintain a safe and healthy environment for students; thus, he urged the Court to return to the common law doctrine of *in loco parentis*⁸⁷ and emphasized that "the task of implementing and amending public school policies [was] beyond the Court's function."⁸⁸ Justice Thomas also argued that as long as it was "objectively reasonable to believe that the area searched could conceal the contraband," then the search was within the scope justified by *T.L.O.*⁸⁹ Justice Thomas further argued that the Court's decision told students "the safest place" to hide drugs, while limiting the ability of school officials to respond.⁹⁰ Justice Thomas emphasized that the result of the Court's opinion was a test that was "unworkable and unsound" because the strip search of a student "for prohibited drugs [would] be permitted only if the Court agrees that the drug in question was sufficiently dangerous."⁹¹ In conclusion, Justice Thomas believed the search was "reasonable and justified" under the *T.L.O.* standard; thus, he refused to join the majority's "regrettable decision."⁹²

⁸⁵ *Id.* at 2646 (arguing that Wilson's order to strip search Redding "cannot be reconciled with this Court's opinion in *T.L.O.*").

⁸⁶ *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part).

⁸⁷ *Id.* at 2655.

⁸⁸ *Id.* at 2657. See *supra* note 38 and accompanying text.

⁸⁹ *Id.* at 2649-50.

⁹⁰ *Id.* at 2650.

⁹¹ *Id.* at 2651. Justice Thomas concluded that judges should not mistakenly assume the responsibility of deciding which school rules warranted an invasive search and which rules did not. *Id.* at 2652.

⁹² *Id.* at 2658.

IV. DISCUSSION

The Supreme Court, in deciding *Redding*, simply applied the reasonableness standard set forth in *T.L.O.* to the facts of the case to find that Redding's Fourth Amendment rights were violated as a result of the strip search conducted by school officials.⁹³ The Court's decision recognized not only that Redding's account of her search was "embarrassing, frightening and humiliating" but that "adolescent vulnerability intensifie[d] the exposure's patent intrusiveness."⁹⁴ Recognizing the intrusive nature of a search of a thirteen-year-old's bra and underwear and the heightened standard of "reasonable suspicion" necessary for such a search, the Court concluded that the school officials had no reason to suspect the drugs presented a danger or were concealed in Redding's underwear. Thus, the Court clearly established that strip searches are in separate category that demands particular suspicions.⁹⁵

Thus, the Court elaborated on and clarified the scope of a student's Fourth Amendment rights in regard to school searches.⁹⁶ Thereby, *Redding* recognized and expanded the privacy interests of students at school, which were previously unclear and narrow in focus.⁹⁷ Although the Court granted the school officials qualified immunity, the *Redding* decision stands as a victory to students nationwide because it resulted in a "clearly established" ruling. Thus, *Redding* secured the Fourth Amendment right of millions of students to be free from humiliating, unjustified, and unreasonable strip searches.⁹⁸

However, given the narrow focus of the opinion to the specific facts of the case, the subsequent application of *Redding* by lower courts may prove difficult and result in inconsistent holdings as courts are presented with varied and more complex fact patterns that are not as obviously intrusive as the facts in *Redding*. Until lower courts apply *Redding* to invalidate school

⁹³ *Id.* at 2639-43 (majority opinion). See *supra* notes 63-75 and accompanying text.

⁹⁴ See *supra* note 70 and accompanying text.

⁹⁵ See *supra* notes 69-75 and accompanying text.

⁹⁶ See *supra* notes 26, 38-40 and accompanying text.

⁹⁷ See *supra* notes 51-58, 74 and accompanying text.

⁹⁸ See *supra* notes 78 and accompanying text.

searches in other, more difficult cases, the question of its practical effect remains unanswered.

CONCLUSION

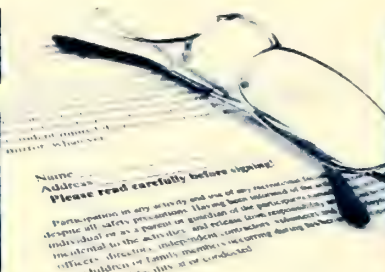
In *Safford Unified School District No. 1 v. Redding*, the Supreme Court held that a student's Fourth Amendment right to be free from unreasonable searches was violated when the student, who was under suspicion of possessing prohibited drugs, was subjected to a strip search by school officials when there was no reason to suspect the drugs presented a danger or were concealed in the student's underwear. Through its decision, the Court granted students more extensive privacy interests by clarifying and enlarging the scope of a student's Fourth Amendment rights in the school setting. The extent of a student's Fourth Amendment rights was previously unclear, as evidenced by the differing treatments by lower courts of the *T.L.O.* standard. While this decision was a narrow application of a student's Fourth Amendment rights to case-specific facts, *Redding* clearly established a precedent that could result in liability for school officials who disregard their students' Fourth Amendment rights and privacy interests.

Joseph Shayeb



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TRIBUTE



**JUDGE RHESA HAWKINS BARKSDALE
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT**



FOREWORD

*Chief Judge Edith H. Jones,
U.S. Court of Appeals for the Fifth Circuit*

Judge Barksdale's former clerks approached me last summer with a request to write an introduction, as Chief Judge of the Fifth Circuit, to these articles and recollections honoring the Judge's career as he assumes senior status on our court. Like Judge Jolly, I do not consider a judge's senior status to be as much a milestone as a gateway to a new phase of judicial responsibility. Judge Barksdale became eligible on his sixty-fifth birthday, having served in an active duty status for over fifteen years, to ascend to senior status, and he elected to do so. In that position, he will continue to hear appeals as he chooses to do so, he will have a full staff for his purposes, and he will participate in court activities and functions. He will also be viewed by his colleagues and the new judges, who will inevitably join our court, as a voice of experience, as this court has always prized the assistance of our senior colleagues. While senior status offers the Judge an opportunity to enjoy his family or hone new and old talents, free of the relentless press of this very busy court's workload, I am confident that Judge Barksdale will continue to contribute to our decisions.

The writings that follow are offered by two of our judicial colleagues, one longtime friend, and three former law clerks who have become professors of law. They shed light not only on Judge Barksdale's career, but also by extension on the careers of all federal judges. Few of us will be privileged to see in print thoughtful summaries of our decisions, amusing anecdotes of our early lives, or reminiscences about the serendipitous events that led us to the federal bench. Yet, with some notable exceptions that I shall mention, there are parallels here to our collective experiences that are worth memorializing. For instance, for many federal judges appointed in recent decades, the path to confirmation was neither fast nor without bumps. Another commonality, as the warmth of the Judge's former clerks attest, is that law clerks are deeply influenced by the judges they serve.

The relationships we build and impact we have on our clerks is without a doubt one of the most satisfying aspects of being on the bench. The articles describing Judge Barksdale's opinions demonstrate how we are all ultimately judged, by the legal profession, academia, and our judicial peers, for our diligence, integrity, clarity of expression, and analytical precision.

It may also be said concerning most of us, as one of these commentators says of Judge Barksdale, that our judicial philosophy does not leap fully explained from the pages of our opinions. Instead, one must digest the opinions and uncover inductively the principles that shape our decisions. And even then, consistency may seem elusive for many reasons, including the force of precedent, the factual and procedural quirks in a trial court record, or the competency and approach of counsel. Two of our court's brightest judges, John Minor Wisdom and Tom Gee, startled me at lunch one day years ago when each of them disavowed having a particular legal philosophy. With additional experience, I now understand what they meant. We are tasked to employ rules of decision making that spring from our legal heritage. When correctly followed, these rules, ranging from standards of appellate review, to deference to the legislature or regulatory agency, to respect for written texts, usually determine the outcome of appeals. One's judicial philosophy should not overwhelm one's respect for the rules, else it becomes judicial whim. A judge may have a brilliant judicial philosophy, but if the judge conscientiously applies the fundamental rules of decision-making, it is his craftsmanship, not his philosophy, that will be on display. And so it has been with Judge Barksdale.

The singularities of Judge Barksdale's career evident in these writings describe both the man and the judge, so intertwined are his experiences and performance on the bench. First, his military service indelibly affected his outlook as it has the details of his interaction with clerks and colleagues. To take one small example, not many judges call our clerks "lieutenants," but then hardly any of us earned the right to do that through hard battlefield service. Second, Judge Barksdale is one of a select few federal judges who served as law clerks on the U.S. Supreme Court. His oft-repeated stories about his magical year

with Justice Byron White are emblems of his personal history and of his approach to judging and being a judge. Third, the Barksdale family, as it was and is, instilled in him tribal loyalty and a compulsion to succeed. Fourth, although it may be only implicit in these tributes, the State of Mississippi casts its spell over Judge Barksdale's personality and career. This is not the place to analyze the unique attributes of the state or its citizens; suffice it to say that I have found during my tenure on our court that the characteristics of life in Mississippi have encouraged a disproportionate number of its citizens to excel in law, business, the learned professions, and political life. Judge Barksdale plainly benefited from his opportunity for success, as he benefited from Mississippians' great story-telling ability.

With this introduction, I trust the reader is poised to enter into the mind of Judge Rhesa Barksdale, as revealed by those who know him well.

TRIBUTE TO JUDGE RHESA H. BARKSDALE

*Judge E. Grady Jolly,
U.S Court of Appeals for the Fifth Circuit*

When Judge Barksdale came to the court, I was well acquainted with him on a personal and professional level. I had known him from the moment he first started practicing law and had known his brothers before him; all had reputations for ability and achievement in school and after. I had practiced with his youngest brother, whose coruscating intellect I have always admired. In the practice of law Judge Barksdale lived up to his family reputation, and to the expectations of those of us who knew him as the top graduate of the Ole Miss Law School and as a United States Supreme Court law clerk. Thus, when Judge Barksdale joined the court in 1990, I expected that he would be a first class judge. I have not been disappointed. No one on our court has worked harder or with more focus. The opinions that he has produced have been superior. On the occasions when we sit together, and Judge Barksdale submits a draft opinion for my concurrence, I do not entertain the slightest doubt about the depth of its legal research, the preciseness of its reasoning, or its comprehensive understanding of the record. Any judge on our court who challenges his views of the law or of a particular case undertakes a daunting task.

Judge Barksdale's service on the United States Court of Appeals for the Fifth Circuit has most certainly enhanced the reputation of the court and has made the state of Mississippi proud of its son. For almost twenty years, I have valued his counsel and his friendship on this court. Because his taking senior status means that he has only partially retired, I look forward to our collegial and personal association for many years to come.

JUDGE RHESA H. BARKSDALE: A TRIBUTE TO A DISTINGUISHED GRADUATE OF THE OLE MISS LAW SCHOOL

*David W. Case**

United States Fifth Circuit Court of Appeals Judge Rhesa Hawkins Barksdale is one of the most distinguished and successful graduates in the history of the University of Mississippi School of Law. In the fall of 2008, Judge Barksdale shared the news with his many former law clerks that in August 2009 he would take senior status on the occasion of his sixty-fifth birthday. Within minutes of learning of his decision, my colleague Professor Chris Green and I, both former law clerks to the Judge, began organizing this *Mississippi Law Journal* tribute. As members of the faculty of the Judge's law school alma mater, we felt a special responsibility to ensure the publication of a worthy tribute to a remarkable career and an even more remarkable individual. Moreover, because the Judge was a member of this publication's editorial board during his law school career, Professor Green and I believed it important and especially fitting for this tribute to be published in the *Mississippi Law Journal*.

The Judge's announcement came as a surprise to his former clerks, a group that has grown considerably since he first joined the Fifth Circuit bench on April 1, 1990. The opportunity to become part of an extended family of former and future clerks is a special privilege of a judicial clerkship, and that experience has been especially vibrant and rewarding for the clerks of Judge Barksdale. The Judge has gone to great, and very much appreciated, lengths to foster a feeling of warmth and family in his

* Associate Professor of Law, University of Mississippi School of Law. B.A., J.D., University of Mississippi; LL.M., Columbia University; Ph.D., Vanderbilt University. The author served as a law clerk to Judge Barksdale during 1991-1992. Many details in this essay regarding Judge Barksdale's life and career were gleaned from an outstanding profile written by Bob Frey in the January 2008 issue of *The Federal Lawyer*. See Bob Frey, *Judicial Profile: Hon. Rhesa Hawkins Barksdale: U.S. Circuit Judge, U.S. Court of Appeals for the Fifth Circuit*, FED. LAW., Jan. 2008, at 34.

former clerks by taking a deep-seated personal interest in our lives and careers both during and following our clerkships. Each year on our birthday the Judge, without fail, delights us by contacting us to extend good tidings on the special day.¹ He routinely reaches out to convey congratulations on special occasions such as weddings, the birth of children, or the beginning of new jobs. Over the last two decades we have had many marvelous reunions, dinners, and other special gatherings together with the Judge, his chambers staff, and current and former law clerks in both Jackson, Mississippi, and New Orleans. In our time on the Ole Miss faculty, Professor Green and I and our spouses also have had the wonderful honor of spending time with the Judge and his wife Claire when he has been at Ole Miss for sittings of the Fifth Circuit at the law school.

From this frequent contact, we former clerks know that Judge Barksdale exudes the same high energy, drive, and intensity as in his first days on the bench. He could easily serve another decade and more on active status, and thus this milestone, most certainly for his former clerks, has come far sooner than expected. The Judge's move to senior status is, "needless to say,"² a richly deserved honor coming as it does after a long and especially distinguished legal and judicial career. However, our happiness on this special occasion may be tempered the slightest bit by self-reflection on what this milestone suggests about how far down the path we have come in the journeys of our own respective lives and careers.³ This may be especially true for those of us who, as I did, clerked for the Judge in his earliest years on the court. Simply put, although the Judge was clearly ready to take this step, perhaps his extended chambers family

¹ I was privileged to serve as one of the Judge's clerks on his second year on the Fifth Circuit. Thus far, I have received seventeen such "birthday calls" from the Judge and look forward to many, many more.

² Here, I am quoting the Judge in published and unpublished opinions far too numerous to cite in a single footnote.

³ My clerkship with the Judge in 1991-1992 was a critical first step in transitioning from a career in private law practice to my present career as a law professor. The opportunity that the Judge provided in hiring me as his law clerk was the single most important factor in that journey's eventual successful conclusion. I have thanked him often over the years for opening the door for me, but I can never thank him enough. For more, see David W. Case, *The Pedagogical Don Quixote de la Mississippi*, 33 U. MEM. L. REV. 529, 540, 542 (2003).

was not quite so ready for him to do so. An era that meant so much to us on a deeply personal level is now ended, adding a tinge of bittersweet flavor to an otherwise joyous occasion. Our high esteem, admiration, and everlasting affection for him, however, allow us to unreservedly celebrate with him as “our Judge” moves to this new phase of his truly extraordinary career.

Judge Barksdale was born on August 8, 1944 in Jackson, Mississippi, the fourth of six sons of John and Mary Barksdale. The Judge talks often of growing up as one of six brothers—in order, Jack, Tom, James, Rhesa, Bryan, and Claiborne—and how his parents fostered a healthy sense of ambition and drive among them. The Barksdales’ nurturing of their sons’ natural talents paid extreme dividends as all six have achieved exceptional success in their respective lives and careers.⁴ In a foreshadowing of his future military career, the Judge’s parents named him for a great-grandfather—Rhesa Hawkins Barksdale—who served in the Confederate Army. The Judge’s great-grandfather was wounded in Maryland during the Battle of Sharpsburg in 1862, and was later captured in Pennsylvania on July 3, 1863, during Pickett’s charge on the last day of the Battle of Gettysburg. He was imprisoned at Fort Delaware until his release on June 11, 1865, after agreeing to sign an oath pledging loyalty and allegiance to the Union. Rhesa Hawkins Barksdale’s oath of allegiance is now prominently displayed on the wall of his great-grandson’s chambers in Jackson.⁵

As both an alumnus and member of the university’s faculty, I am well aware and immensely appreciative of the Barksdale family’s deep roots at Ole Miss. In addition to the Judge’s ma-

⁴ Bob Frey captures this well in his profile of Judge Barksdale in *The Federal Lawyer*:

[T]he judge’s parents . . . instilled in their six boys a love of family, education, sports, church, and excellence. And all six were proof of their parents’ training: Jack, the oldest, had an outstanding career with IBM; Tom, two years younger, was a highly successful banker; the next child, Jim, founded Netscape and later, the Barksdale Reading Institute at Ole Miss; the judge’s younger brother, Bryan, is a cardiologist; and Claiborne, the youngest boy, is a lawyer who now heads the Reading Institute.

Frey, *supra* note *, at 42.

⁵ See *id.* at 34.

trication at the law school, both of his parents and all five of his brothers attended Ole Miss. Thus far, six children of the Barksdale brothers are among the latest generation of Barksdales who have attended the university. This includes three who have attended the law school—James' daughter Susan Barksdale Howorth, and the Judge's two children, daughter Trhesa Barksdale Patterson and son Russell Barksdale (whom I have been privileged to teach in my classes). Numerous spouses and in-laws among the Barksdale family have also attended Ole Miss, including the Judge's brother-in-law Rob Jones (brother of his wife Claire), also a graduate of the law school.

Importantly, however, the relationship between Ole Miss and the Barksdale family extends well beyond, and well after, the attendance of individual family members at the university. The Judge's brother Bryan is a past president of the University of Mississippi Alumni Association and is currently a professor of cardiovascular medicine at the University of Mississippi Medical Center. The Judge's brother James, former president and chief executive officer of Netscape Communications Corporation, was inducted into the University of Mississippi Alumni Hall of Fame in 1996. One of the most important events in the university's history occurred in 1997 when James, together with his late wife Sally, donated \$5.4 million to establish the Sally McDonnell Barksdale Honors College at Ole Miss. In 2000, in a further act of immense generosity, James and Sally Barksdale made a \$100 million gift to the University of Mississippi Foundation to create the Barksdale Reading Institute for the purpose of improving the literacy skills of Mississippi schoolchildren. The Judge's brother Claiborne, also a graduate of the Ole Miss Law School,⁶ is currently the chief executive officer of the Barksdale Reading Institute. To say that the Barksdale family has positively impacted their shared alma mater is a monumental understatement.

Notwithstanding his strong family connections to the university, however, the Judge followed a different call—that of

⁶ Claiborne Barksdale graduated from the law school in 1974 and later clerked for Judge E. Grady Jolly on the Fifth Circuit, one of the Judge's Mississippi colleagues on the Fifth Circuit for the past two decades and a contributor to this tribute.

service to country—in deciding where to pursue his college education. In 1962, the Judge accepted an appointment to the United States Military Academy, following in the footsteps of his Uncle Battle Barksdale, a member of the West Point class of 1937.⁷ Judge Barksdale graduated in 1966 in the top fifteen percent of his class at West Point, and his numerous activities included the Glee Club and the Cadet Chapel Choir, Brigade Boxing, the Student Conference on United States Affairs, and service as head manager of the academy's football team.

For the cadets of the West Point class of 1966, however, the omnipresent backdrop for the entirety of their college experience was the ongoing war in Vietnam. The news media of the day took a strong interest in the roles many in the Corps of Cadets would undertake in Vietnam following graduation. Ten members of the Judge's graduating class, including Judge Barksdale, were profiled in *Newsweek* magazine in July 1967 regarding their respective preparations and training for combat operations. Poignantly, *Newsweek* observed in that feature that "[t]he cadets of the class of 1966 . . . had . . . come to see their own personal destinies as being inextricably linked to Vietnam."⁸ Judge Barksdale volunteered for service in Vietnam, as did the majority of his classmates.⁹ Indeed, so many of the class of 1966 volunteered for combat that the Army developed a quota system based on class standing to decide which graduates would serve their first tour of duty in Vietnam. Judge Barksdale was a part of this first group. Quoted in a *New York Times* article published the day prior to his graduation, the Judge described his decision to volunteer for combat as "something I have to do because I have an obligation to this country."¹⁰

⁷ Like his nephew, Battle Barksdale had a distinguished military career following his graduation from West Point. He served in the United States Army for twenty years, retiring in 1957 as a Colonel. Battle Barksdale was stationed in Hawaii during the surprise attack on Pearl Harbor and other military installations on December 7, 1941. In addition, Colonel Barksdale served as a battalion commander in the European Theater during World War II. He also commanded an American artillery battalion and later was advisor to a South Korean artillery unit during the Korean War.

⁸ *West Point Goes to War*, NEWSWEEK, July 10, 1967, at 54.

⁹ *Id.*; Douglas Robinson, *West Point Class of '66 Eager to Fight*, N.Y. TIMES, June 8, 1966, at 34.

¹⁰ Robinson, *supra* note 9, at 34.

Months of training, including completion of Airborne and Ranger schools, followed graduation, and, in August 1967, Lieutenant Barksdale arrived in Vietnam. The Judge initially commanded a platoon in the First Squadron, Army's First Armored Cavalry Regiment, with responsibility for fifty-four men, three tanks, and six personnel carriers. The squadron was committed to battle a mere two days after its arrival in Vietnam. The following month, a land mine exploded under the Judge's armored personnel carrier during a patrol, killing his driver and wounding everyone inside. Lieutenant Barksdale was later awarded the Bronze Star for valor for his role in organizing a defense and aiding the wounded in the aftermath of the explosion.¹¹ Following this early brush with death, the Judge's service in Vietnam continued to personify courage and honor. On December 3, 1967, his troop's base camp was overrun by enemy troops. He was subsequently awarded the Silver Star for commanding the defense that thwarted the attack and drove off the enemy.¹²

Other commendations received by the Judge for his combat service include the Purple Heart, a Bronze Star for meritorious service, and the Vietnamese Cross of Gallantry with Silver Star. He received two promotions during his tour of duty in Vietnam, first to troop executive officer and later to assistant division operations officer. Many in Judge Barksdale's West Point graduating class paid the ultimate price for their dedication to country and service in the war. In all, thirty members of the class of 1966 were killed in Vietnam, the highest number of any class of cadets in that war. A plaque bearing the names of his West Point classmates killed in Vietnam hangs in the Judge's chambers in Jackson.¹³

Following his return to the United States in July 1968, Judge Barksdale completed his military service as an ROTC instructor and assistant professor of military science at the University of Akron. Significantly, it was at this time that the Judge began his legal career by attending law school at night at Akron. The Judge completed his service in the Army in 1970

¹¹ Frey, *supra* note *, at 35.

¹² *Id.*

¹³ *Id.*

with a final rank of Captain. Upon his separation from the Army, the Judge returned to Mississippi to continue his legal education at the University of Mississippi.

The Judge's law school career at Ole Miss was a study in the pursuit of excellence. He was the comment editor of the *Mississippi Law Journal*, and his student note was selected for publication in the *Journal*.¹⁴ Impressively, as a law student, Judge Barksdale also co-authored an influential law review article with a member of the law school faculty critically analyzing the status of Mississippi products liability law.¹⁵ The Judge graduated first in his law school class in 1972, earning the Dean Robert J. Farley Award, presented annually to the student graduating with the highest academic average in the class. The law school faculty also selected Judge Barksdale for the Phi Delta Phi Award as the outstanding graduate in his class. A plaque listing the names of previous Phi Delta Phi Award winners hangs in the main entrance to the Lamar Law Center on the Ole Miss campus. The plaque's inscription aptly captures the essence of the Judge's law school career, noting that the honor is extended annually by the law school faculty to that graduating senior who "best exemplified the attributes indicative of the successful lawyer, of character, scholarship, personality, and general ability."

Following law school, Judge Barksdale served as a law clerk to United States Supreme Court Justice Byron White, becoming one of only three graduates in the history of the Ole Miss Law School to clerk on the Court.¹⁶ Judge Barksdale often speaks of his admiration, respect, and affection for Justice White and the profound influence his clerkship with the Justice has had on his own judicial career. In a 1993 *Harvard Law Review* essay written to honor the occasion of Justice White's retirement from the Court, Judge Barksdale observed:

¹⁴ Rhesa H. Barksdale, Note, D.W. Boutwell Butane Co. v. Smith – *Employee Exoneration with Employer Liability – An Anomaly*, 42 MISS. L.J. 515 (1971).

¹⁵ Frank L. Maraist & Rhesa H. Barksdale, *Mississippi Products Liability – A Critical Analysis*, 43 MISS. L.J. 139 (1972).

¹⁶ The other graduates of the law school who have served as Supreme Court clerks are Raymond L. Brown (class of 1962 – Justice Tom Clark) and W. Wayne Drinkwater, Jr. (class of 1974 – Justice Warren Burger).

[M]y service on the federal bench perhaps provides me with additional appreciation for his qualities as a judge. The lasting impression from working for Justice White was such that, although seventeen years elapsed between ending service to him and beginning service as a judge, my first day in the latter seemed only one day removed from the former. (That feeling was also experienced by another of his former clerks who became a federal judge.) My chambers, for the most part, are patterned after his; it is my hope that my clerks have some modicum of the feeling of collegiality, mutual respect, professionalism, and team effort that Justice White engendered in his chambers.¹⁷

I am confident that I do not overstep my bounds by responding to the implicit query raised in the passage above on behalf of the entire family of former Barksdale clerks. Working for Judge Barksdale was indeed a tremendously rewarding personal and professional experience. He treated us with respect and as valued colleagues—his “lieutenants” the West Point graduate and former Army Ranger would often call us.¹⁸ He actively solicited our input on pending cases and encouraged us to be candid with our views. He patiently mentored us not only for the purpose of accomplishing the important work of the chambers, which as a team under his guidance we did efficiently and well, but also with an eye towards enhancing the quality of our future professional careers. My career as both an attorney and law professor has been influenced in ways too numerous to list by what I learned from the Judge during the year of my clerkship. I am certainly not unique in that regard among his former clerks; as a group we are universally in his debt for what he taught us during our service. I have no doubt that the wonderful quality of our experience as clerks for Judge Barksdale was directly correlated to the extremely rich and rewarding experience of the Judge’s own clerkship with Justice White. For that, we

¹⁷ Rhesa H. Barksdale, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3, 5 (1993) [hereinafter Barksdale, *Justice White*].

¹⁸ The Judge would also sometimes refer to my co-clerks—Lynn Ladner and Jim Boswell—and me as “men” in the sense of us constituting his “troops.” To stave off any confusion we might collectively have relating to the use of that term in relation to Lynn, the Judge assured us that in the context of our clerkship, as in the Army, the term “men” was entirely gender neutral.

former clerks of the Judge also owe Justice White a debt of profound gratitude.

Following his clerkship, Judge Barksdale spent seventeen years in private law practice with the Jackson, Mississippi firm of Butler, Snow, O'Mara, Stevens & Cannada. His practice focused primarily on commercial litigation, but he handled numerous other types of cases as well, including First Amendment work for the Jackson newspaper. Not surprising as a former military officer, he was committed to service to his communities outside of his law practice. Thus, the Judge found time in his busy schedule to teach constitutional law at the Mississippi College School of Law and the University of Mississippi's paralegal program in Jackson. He also volunteered on behalf of the Arthritis Foundation, St. James Episcopal Church, and the St. Andrews school, and served as chairman of the Mississippi Vietnam Veteran's Leadership Program from 1982 to 1985. The Judge was also active in state politics, serving on the executive committee of the Mississippi Republican Party, as a delegate to the Republican National Convention in 1988, and as one of Mississippi's presidential electors in the Electoral College following the 1988 presidential election.

In 1989, the Judge was nominated to the Fifth Circuit by President George H. W. Bush. He received his commission on March 12, 1990 and began serving on April 1, 1990. His seat on the court had previously been held by Judge Alvin Rubin of Louisiana. During my clerkship, the Judge spoke often of his admiration of Judge Rubin and took considerable pride in having been appointed to fill his seat. Judge Rubin was appointed to the seat in 1977 when the previous holder of the seat, Judge John Minor Wisdom, took senior status. In a 2000 tribute memorializing Judge Wisdom in the *Mississippi College Law Review*, Judge Barksdale recounted that Judge Rubin had named the seat the "Wisdom Seat."¹⁹ The Judge was a great admirer of Judge Wisdom and considered it his "good fortune" to have inherited the "Wisdom Seat" from Judge Rubin.²⁰

¹⁹ Rhesa Hawkins Barksdale, *Tribute to John Minor Wisdom*, 20 MISS. C. L. REV. 235, 235 (2000).

²⁰ *Id.*

A unique expression of his admiration of Judge Wisdom was the Judge's practice of giving his clerks the same writing instructions—"Wisdom's Idiosyncrasies"—at the start of their clerkships that Judge Wisdom gave to his.²¹ I still recall receiving my copy of "Wisdom's Idiosyncrasies" from the Judge in the summer of 1991, and, nearly two decades later, my writing continues to be influenced by the lessons gleaned from them. During my clerkship, I recall the excitement that permeated the entire chambers when the Judge announced, with considerable delight, that he had been assigned to a panel that included Senior Judge Wisdom. Judge Wisdom was a giant of the federal judiciary, and, as Judge Barksdale emphasized with generous affection in his tribute to the great judge, the Fifth Circuit courthouse was "named so appropriately for him in 1994."²²

Judge Barksdale's respect for the great jurists that preceded him on the Fifth Circuit was a lesson by example that was certainly not lost on his law clerks. Similarly, Judge Barksdale demonstrated on a daily basis his equal admiration of the Fifth Circuit colleagues with whom he served. He is effusive in his praise for the judges and staff of the court in the performance of their duties. Quoted in a 2008 profile in *The Federal Lawyer*, Judge Barksdale emphasized that "[e]very person, in every position" on the court performs "superbly."²³ The Judge understands well the critical importance of collegiality to the proper functioning of an appellate court and at this aspect of his service on the Fifth Circuit he has excelled. In his *Harvard Law Review* tribute, Judge Barksdale discussed this quality in Justice White:

He got along with all of [the Justices with whom he served]; he made it a point to. And, whatever their backgrounds or legal persuasion, they liked him. He was never personal in his opinions, and was always gracious and thoughtful in his dealings with each member of the Court.²⁴

²¹ *Id.* at 237.

²² *Id.* at 235.

²³ Frey, *supra* note *, at 42.

²⁴ Barksdale, *Justice White*, *supra* note 17, at 7.

Although describing the Justice for whom he clerked, these words apply with equal weight to Judge Barksdale and the manner in which he conducts himself in his service as a federal judge. For the Judge, collegiality is certainly about respect and kindness for his fellow judges and the staff of the court, but it is also about his devotion to the institution that they all serve. By treating his colleagues with graciousness and respect, he does honor to the court he serves. For a man who has lived the majority of his adult life in service to his country, this is no small matter.

A specific example of the Judge's kindness and good heart involves a personal anecdote. Some years following my clerkship, I had the opportunity that all judicial clerks should experience at least once—the chance to make an argument before the judge for whom he or she previously clerked. The day before my scheduled oral argument in New Orleans, I called the clerk's office to determine who was assigned to the panel. When I heard Judge Barksdale's name, I immediately knew two things with absolute certainty. First, having observed the Judge during dozens of oral arguments during my clerkship, I knew the first question I would get from the bench would come from him. I also knew that this question would “cut to the chase”; that is, go straight to the heart of the Judge's view of the most important potential vulnerabilities in my argument as reflected in his careful and exacting evaluation of the briefs. Indeed, this is but another way in which Judge Barksdale follows the example set by Justice White, of whom the Judge has praised for:

[H]is active participation at oral argument, where his insightful, penetrating questions are designed to bring the real issues into sharp focus, to try to find answers to questions prompted by the briefs. As he has said, he does not view oral argument as a means of giving due process to counsel, but as a means of trying to better understand the case.²⁵

²⁵ *Id.* at 6. Judge Barksdale believes strongly in the critical importance of oral argument being productive and adding value to the court's ability to understand the issues and appropriately resolve the case. Regarding this, he has emphasized:

At oral argument, time is short and the court is focused on the issues at hand. (On our court, a great deal of time and effort is invested in preparing for it.)

Again, although he applied these words in tribute to Justice White, they further describe with equal effectiveness another of the many qualities that make Judge Barksdale an outstanding appellate judge.

The second thing I knew instinctively upon learning I would argue before the Judge was that he would go out of his way to treat me as he would any other advocate appearing before him. Said another way, there most certainly would be no "taking it easy on me" as one of his former clerks. My prediction on both counts proved deadly accurate. Only a few minutes into my argument, the Judge raised the question that, for him, I would need to satisfactorily answer in order to convince him that my client's position on the merits should prevail. Having suffered a dismissal in the trial court on summary judgment, I already knew I had a serious uphill climb, but the Judge's question put me on immediate notice that the hill was even larger than I had envisioned. I began the effort to persuade him that his concern should not affect my argument that a material factual dispute was present that necessitated a trial. In other words, although a loss on the merits might eventually be in my client's future, I argued that loss should come at the hands of a jury rather than the trial judge.

My familiarity with the Judge's tone and body language was probably an advantage, but that familiarity was also probably unneeded to perceive that I was not winning him over. Instinctively, I began addressing myself to the other two members of the panel, hoping that the Judge's problem with my argument would eventually be expressed in a dissenting opinion. Alas, it was not. As I later jokingly expressed to the Judge, when virtually no questions were asked during my opposing counsel's argument, I considered the possibility that the panel's

The court wants – indeed needs – input from counsel. Among other objectives, the court wants to test or challenge the strength or logic of positions advanced by counsel, and it attempts to receive that assistance, or achieve that purpose, primarily through answers to its questions. . . . Questions by the appellate court provide an excellent means for counsel to highlight and explain the points considered critical by the court.

Rhesa Hawkins Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573, 575 (1999) [hereinafter Barksdale, *Civility*].

affirmance of the lower court might actually beat me back to my office before I could complete the drive from New Orleans to Jackson, Mississippi. It did not arrive quite so quickly, but an order of affirmance without written opinion arrived in my mail in relatively short order.

Several weeks later, the Judge's staff and current law clerks and several former clerks gathered together with the Judge in chambers for our annual celebration of the anniversary of his joining the Fifth Circuit in 1990. The subject of my argument before the Judge was raised, and I shared my experiences with the group of standing on the other side on the bench from "our Judge." With considerable kindness and warmth, the Judge informed the group that I had made a very good argument on behalf of my client, especially given the obvious challenges I had faced. In what is high praise coming from him, the Judge announced to the assembled group that I had "served my client's interests extremely well." I was touched, and remain touched to this day, by the Judge's desire that everyone know his high opinion of my performance as an advocate before the Fifth Circuit bench. The Judge also touched me by relating an amusing exchange with one of the other judges on the panel who, after learning during the post-argument conference that I was a former law clerk to the Judge, suggested with some emphasis that, in that case, perhaps the Judge indeed had been a "bit hard" on me. I disagreed with that assessment, of course. The Judge showed me great respect by treating me not merely as a former clerk, but as "a true lawyer [and] a true professional" and engaging with me fully in the professional dialogue so critical to appellate advocacy.²⁶

Serving as a law clerk to Judge Barksdale was one of the most deeply rewarding experiences of my life. Almost two decades later, I cannot imagine what my life and career might have been without that wonderful opportunity and his profound influence on me. I am tremendously proud of having been among his first law clerks on the Fifth Circuit and, as I am fond of mentioning at our clerk reunions, his very first clerk from the Ole Miss Law School, our shared alma mater. He is a gentle-

²⁶ Barksdale, *Civility*, *supra* note 25, at 577.

man, a scholar, a great man, a kind soul, a wonderful mentor to young lawyers, a true professional with the highest of standards, and has indeed lived “a life marked by excellence.”²⁷ The Judge’s life has been one of exceptional achievement and a true personification of the West Point motto, “Duty, Honor, Country.”²⁸ Both of his alma maters—West Point and the University of Mississippi—must be extraordinarily proud of having produced such a shining example of excellence, dedication, and selfless service to our country.

Fortunately, that service is not over. Although no longer an active duty member of the court, Senior Judge Barksdale will continue making valuable contributions to performance of the important work of the Fifth Circuit. He will continue to take an active role in oral arguments, write meaningful opinions,²⁹ inspire young law clerks, and exude those qualities that combine to make him an outstanding jurist. We are not saying farewell to “our Judge,” simply congratulations on a well deserved honor and best wishes for many more years of magnificent service in his new role.³⁰ We also say, thank you.

²⁷ Barksdale, *Justice White*, *supra* note 17, at 7. Once again, I take the liberty of describing the Judge by utilizing his own words in describing Justice White.

²⁸ United States Military Academy, *The U.S. Military Academy Coat of Arms and Motto*, http://www.usma.edu/PublicAffairs/Press_Kit_files/CoatArms.htm.

²⁹ For excellent discussions of notable opinions authored by the Judge, see Christopher R. Green, *Some Themes From Judge Rhesa H. Barksdale's Published Opinions*, 79 MISS. L.J. 261 (2010) and Andrew C. W. Lund, *The Importance of Lawyers in Judge Barksdale's Writings*, 79 MISS. L.J. 301 (2010).

³⁰ Recently, the Judge has himself suggested that we can look forward to a lengthy future of additional years of service by him on the Fifth Circuit bench. In an article published in the Jackson, Mississippi newspaper regarding his decision to take senior status, Judge Barksdale is quoted as follows: “I will continue to serve on the bench until I die. I consider myself blessed to serve in the federal judiciary.” Jimmie E. Gates, *Appellate Judge Cutting Workload*, CLARION-LEDGER, Sept. 13, 2009, at B1. When I asked about this quote in a recent conversation with the Judge, he stated that the reporter neglected to include *everything* he had said on this subject. Following his statement regarding how long he intended to continue to serve, the Judge had added the qualifier “which I hope is a very long time from now” that, for whatever reason, did not make it into print. Needless to say, and again speaking for the entire family of Barksdale clerks, we fervently share his hope and see this in its entirety as extremely good news.

THE JOURNEY OF RHESA H. BARKSDALE TO THE FIFTH CIRCUIT: A FRIEND'S PERSPECTIVE

*Judge Leslie H. Southwick,
U.S. Court of Appeals for the Fifth Circuit*

Tributes to Rhesa Hawkins Barksdale can enthusiastically be prepared from many perspectives. Judge Barksdale has inspired law clerks by his character and ability, persuaded other judges by his reasoning and hard work, and impressed law professors by the insights and style of his opinions. My thoughts on this extraordinary man have been shaped by a different relationship than those.

I will speak of Rees from the fortunate vantage point of a friend. Our friendship had its origins in our being in the same legal community, was nurtured by our work together in two political campaigns over twenty years ago, then fully blossomed as we shared in the difficulties that can arise when the goal is appointment to a federal circuit court. My principal focus will be on Rees's five-year journey in the 1980's toward his nomination to the Fifth Circuit. As observer, confidant, and, occasionally, aider and abettor in that enterprise, I learned much about his character.

When our roles were later reversed, he sustained me to a near-heroic degree. That taught me even more about him. "Duty, Honor, Country" is the motto of his beloved alma mater, the United States Military Academy at West Point.¹ All three words embrace the obligation of brotherhood that Rees has faithfully upheld.

Early on, our strong connection was our shared political interests. In 1984, we both attended the national convention in Dallas in which Ronald Reagan and George Bush were renomi-

¹ RICK ATKINSON, *THE LONG GRAY LINE: THE AMERICAN JOURNEY OF WEST POINT'S CLASS OF 1966* 31 (Henry Holt 1989). Barksdale, as a member of the 1966 class, was quoted as saying that he looked forward to going to Vietnam because he had a duty to perform. *Id.* at 146.

nated. In 1987, our joint work became particularly close when two political campaigns overlapped. The first was a race for governor. We both supported Jack Reed of Tupelo, who had been a tireless proponent of public education in northeast Mississippi in the 1960's and 1970's, when integration of schools was at its most contentious. Jack was public-spirited, smart, articulate, and not one to take himself too seriously. Rees and I both thought he would be a splendid governor.

During the last week of the campaign, Rees and I went to an event in Tupelo. Vice President George Bush flew there to campaign for Jack. We joined the illustrious public figures on the tarmac, standing at the bottom of the wheeled staircase to Air Force Two as Bush came off the plane. Rees has hanging in his chambers a framed picture of the two of us greeting the Vice President at the bottom of those stairs. Not pictured is what happened a few minutes later. Without any invitation being given, I got into my car and moved into position a few vehicles behind the lead cars for the caravan into downtown. The ride was fast, running all the lights and stop signs with police blocking most of the intersections—I was worried about those where they were not. Riding with me, no doubt worried about my lack of training for such things, were Rees and state GOP Chairwoman Ebbie Spivey. They both still remember the ride. Jack lost narrowly to Ray Mabus for governor.

The other campaign in which we worked was that of George H. W. Bush. Bush was Vice President from 1981-1989. By 1985, his campaign to succeed Ronald Reagan was unannounced, but well underway. Rees was the Bush chairman for the Fourth Congressional District, while I worked closely with Rees as chairman of the state steering committee. We attended the 1988 national convention in New Orleans, which was just one example of the many occasions for close interaction.

The Vice President's son, George W. Bush, was frequently in the state for his father. In May 1988, when George was present for the state GOP convention in Jackson, Rees invited him for a run the next morning. He accepted. We met early at the then-Coliseum Ramada, where the previous day's political activities had occurred. The three of us were to run a five-mile course through downtown and the Belhaven neighborhood,

mapped out beforehand by Rees. I was not used to that distance and started to lag with a mile or two left to go. The future President and future judge did not let me fall too far behind before they circled back to make sure I did not need emergency medical attention. I lied by saying all was well and to go on without me.

Another run came after the national convention. Senator Dan Quayle, the vice presidential nominee, came to Jackson for an evening campaign event at the other former Ramada, the Renaissance on County Line Road. Again Rees took the initiative. He suggested to Senator Quayle that since we knew he was a runner, perhaps the next morning he would like to go for a run. Whether he really wanted to go running or not, being agreeable is what candidates need to be. Quayle was agreeable. Senator Cochran signed up too. Early the next morning, with more Secret Service protection than I was used to having while running, we met at the Chastain Junior High School dirt track and spent some quality time going around in 440 yard circles.

Initiating those runs is a great example of why Rhesa H. Barksdale—who is not much older than I—became a Fifth Circuit judge in 1990 and I did not until 2007. Some people seize the day; others sleep late.

Rees and I were practicing law at different firms, but the excitement of working for candidates in whom we believed, brought us much closer together. By the way, we did a fair amount of campaign work and did not merely run with the celebrities. It was with great relief to me that Bush was elected. I went to Washington to join the Administration. To explain Rees's next adventure, I will backtrack four years.

Throughout the Reagan Administration, there were difficulties with nominations for the Circuit Courts. Delays were common. If the American Bar Association informed the Reagan Administration that it would give a negative rating to someone who had been proposed, often the person was not nominated.²

² SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM [F. D.] ROOSEVELT THROUGH REAGAN* 285-300 (Yale Univ. Press 1997) (discussing the Reagan Administration approach to controversial nominations in his first term, including consideration of Louisiana attorney Ben Toledano in 1982 for the Fifth Circuit).

Rees first became involved in the nomination struggles in 1984 as a result of the creation by Congress of two new seats in July for the Fifth Circuit.³ Houston attorney Edith Jones was fairly quickly selected for one. She was nominated in September 1984, not confirmed, but then approved after being renominated in February 1985.⁴

The other new seat was sharply contested. On December 6, 1984, Senator Thad Cochran recommended to President Reagan that Mississippi receive the appointment; Rees was his candidate.⁵ I had a few weeks earlier sent a letter to Senator Cochran, urging that he recommend Rees to the President: "You know his qualifications as well as I, which include a very keen intelligence, considerable experience in federal court as a trial attorney, and a tremendous willingness to work."⁶ The Senator had made Rees his clear choice without needing any advice from me. Thad's persistent support was indispensable to the success that eventually came.

In November 1985, however, it became public that Professor Lino Graglia of the University of Texas Law School had been selected by the Administration for the second seat. He apparently had been chosen months earlier and a confidential background investigation was underway. Graglia's seemingly imminent nomination drew opposition. He had written articles and made statements in his law school classes that were controversial. Graglia defended on the basis that he was trying to be provocative to students and others. A headline in a New Orleans newspaper said that "Choice for Court Appalls Activists," including civil rights leaders.⁷

³ See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, § 201 (current version at 28 U.S.C. § 44(a) (2006)).

⁴ 130 CONG. REC. 25681 (daily ed. Sept. 17, 1984) (nomination of Edith H. Jones); 131 CONG. REC. 3839 (daily ed. Feb. 27, 1985) (nomination of Edith H. Jones); 131 CONG. REC. 7427 (daily ed. Apr. 3, 1985) (confirmation of Edith H. Jones).

⁵ Tom Brennan, *Courting the 5th Circuit: Is State in Race?*, CLARION-LEDGER (Jackson, Miss.), Jan. 13, 1986, at 1A.

⁶ Letter to Senator Thad Cochran from author (Nov. 27, 1984) (on file with author).

⁷ David Snyder, *Choice for Court Appalls Activists*, TIMES-PICAYUNE (New Orleans), Nov. 17, 1985, at 1. Judi Hasson, *Appointments by Reagan Put His Imprint on the Judiciary*, HOUSTON CHRONICLE, Dec. 1, 1985, at Sec. 1, p. 21.

The Circuit Court positions are not by statute assigned to a particular state. Along with all the other controversies that arise with nominations, the battles among senators from different states for seats are recurring. There were published reports that when the two new seats were created by Congress in 1984, there was an agreement that Texas would get one of the vacancies. It had done so with the appointment of Houstonian Edith Jones. Mississippi and Louisiana were to vie for the other one.⁸ The selection of Professor Graglia of Texas violated that understanding.

The American Bar Association reportedly interviewed Professor Graglia during the summer of 1985. The ABA notified the Administration that Graglia was not considered qualified due to his temperament. In the fall, the Administration asked the ABA to evaluate him again. The ABA did. Again, the response was that he would receive a low evaluation. A news article in January 1986 stated that six months earlier, "Barksdale's nomination seemed doomed" because of Professor Graglia's selection.⁹ Now it was Graglia's selection that was doubtful.

As a way to reach a decision, the Administration contacted Griffin Bell, who had served as a Fifth Circuit judge from 1962–1976. Resigning from the court, he practiced law briefly, then served as Jimmy Carter's Attorney General. Bell agreed to review the ABA's objections. The Bell report was not made public, but someone in the Administration said that Bell "did not give us a reason to go forward" with the nomination.¹⁰ By early August 1986, Graglia was abandoned as a nominee.¹¹

⁸ Brennan, *supra* note 5, at A1.

⁹ *Id.*; Judy Wiessler, *Choice of UT Prof for Judge Becomes Political Hot Potato*, HOUSTON CHRONICLE, Dec. 22, 1985, at 22.

¹⁰ *UT Prof Dropped From Consideration for Court*, HOUSTON CHRONICLE, Aug. 7, 1986, at 4. The Justice Department requested that Judge Bell and two other attorneys independently prepare reports. Judge Bell asked one of his former law clerks practicing in Austin to interview certain people. An oral summary of the interviews was provided only to Judge Bell. The three reports did not convince the Administration to proceed with the nomination. Donald Baer, *Justice Ordered Three Reports on Graglia*, LEGAL TIMES, Aug. 18, 1986, at 4; telephone conversation between author and Austin attorney John Harmon, November 11, 2009.

¹¹ Judy Wiessler, *Scrapping Plan for Texan's Judgeship Shows New Caution*, HOUSTON CHRONICLE, Aug. 10, 1986, at 21; Sheldon Goldman, *Reagan's Second Term*

The struggle continued as to which state would receive the nomination. The next choice was New Orleans attorney Haywood H. Hillyer, III, whose political strength was exemplified by the fact that in 1988 he would become his state's Republican National Committeeman.¹² Rees had again been passed over. Hillyer went through the background checks, initial ABA review, and other requirements. Before any nomination was made, though, Democrats regained a majority in the Senate as a result of the November 1986 elections. Hillyer's prospects were nil, and he withdrew his name from consideration.¹³ Now a new choice had to be made.

In March of 1987, it was reported that Senator Cochran was "virtually conceding that Rhessa 'Rees' Barksdale of Jackson, his choice to fill a vacancy on the 5th Circuit Court of Appeals, has little hope of securing the seat."¹⁴ Cochran said that it "is pretty well final" that Houston City Attorney Jerry E. Smith, promoted by Texas Senator Phil Gramm, would be named.¹⁵ On June 2, 1987, after at least two others were selected by the Administration, only to be abandoned, Smith was nominated. Senators from both Louisiana and Mississippi opposed him, saying the seat should not go to a Texas nominee.¹⁶ After Smith's nomination, Chief Judge Charles Clark sent a letter to Senator John Stennis, arguing that there were too many Texas judges on the court.¹⁷

What may have been necessary to break the stalemate was the creation of a new vacancy. One resulted from the sad event of the death of Judge Robert Hill of Dallas on October 19, 1987.

Judicial Appointments; The Battle at Midway, 70 JUDICATURE 324, 327 n.15 (April-May 1987).

¹² ASHER & ASSOCIATES, OFFICIAL REPORT OF THE PROCEEDINGS OF THE THIRTY-FOURTH NATIONAL CONVENTION HELD IN NEW ORLEANS, LOUISIANA 395 (Republican National Committee 1988).

¹³ Mark Ballard, *Latest 5th Circuit Vacancy Renews Tri-State Struggle*, TEXAS LAWYER, Dec. 11, 1989, at 1.

¹⁴ Tom Brennan & Joe Atkins, *Texan Has Edge on Barksdale for Judgeship*, CLARION-LEDGER (Jackson, Miss.), Mar. 17, 1987, at 1A.

¹⁵ *Id.*

¹⁶ Joe Atkins, *Cochran, Johnston Fight Texan as Judge*, CLARION-LEDGER (Jackson, Miss.), July 22, 1987, at 1B.

¹⁷ Paul Marcotte, *Too Many Texans on the Court?*, ABA JOURNAL, Jan. 1, 1988, at 30.

Judge Hill and his wife were flying home from a vacation in Kenya when he suffered an asthma attack and died on the plane.¹⁸ Smith's senatorial supporters and opponents now focused on that new vacancy being filled by someone from Louisiana or Mississippi. Smith was confirmed on December 19, 1987.

Senator Cochran pressed vigorously for Rees. Senator J. Bennett Johnston, Jr. of Louisiana was sponsoring a good friend of his. The latter was chosen: Jacques Wiener of Shreveport was nominated for the Hill vacancy by President Reagan on June 27, 1988.¹⁹ He was not confirmed before Reagan left office. He was renominated by President Bush in 1989, and finally confirmed on March 9, 1990. Someone else was also confirmed on that day, as I will mention momentarily.

Rees, after first being recommended by Senator Cochran in December 1984, had watched these various machinations from the sidelines. He had twice gone to Washington to meet with attorneys in the Reagan Justice Department, once in December 1984 and again in April 1986. He had not felt encouraged after either meeting. With the naming of Jacques Wiener, the door for Rees seemed closed.

George Bush's 1988 election greatly improved Rees's chances. Senator Cochran continued to sponsor him, now to a new President. A new vacancy was created when Alvin B. Rubin of Louisiana notified the President on June 19, 1989, that he would take senior status on July 1.²⁰ He was suffering from liver cancer that would take his life two years later.²¹ Rees was immediately under consideration. The Administration agreed to interview him. I had started at the Justice Department about two weeks before Rees was interviewed there on August 17, 1989. I sang Rees's praises to various people involved in the process. My earliest move may have been sending a memo to

¹⁸ Tracy Everbach, *Appellate Judge's Death Stuns Friends, Colleagues*, DALLAS MORNING NEWS, Oct. 20, 1987, at 15A.

¹⁹ Ballard, *supra* note 12, at 1.

²⁰ Alvin B. Rubin to the President, June 19, 1989, from Records of the Circuit Executive, U.S. Court of Appeals for the Fifth Circuit, New Orleans.

²¹ Joan Cook, *Alvin B. Rubin, 71; Judge Was Known for Rights Rulings*, N.Y. TIMES, June 13, 1991, at D24.

Murray Dickman, a close adviser to Attorney General Dick Thornburgh, two days after I started working at Justice.

The night before his meetings, Rees stayed at the condo in Alexandria that our mutual friend, Pete Perry, and I were renting. I almost certainly would have forgotten something that happened that night had Rees not reminded me of it from time to time. From our visitor's perspective, I had fallen into some uncouth habits. I proved that fact after supper by getting an ice cream carton out of the freezer and eating out of it with a spoon. In my defense, I was just scraping the last of the ice cream out before throwing the carton away. I had to exhibit better table manners the next day, as I was able to arrange lunch for us in the White House Mess.

Rees thought his interviews had gone well. I received that same word from a Justice Department attorney, Barbara Drake, who worked on judicial selection issues. She and the others were greatly impressed by Rees. Expressing his support, George W. Bush sent a hand-written note to his father's White House Counsel, Boyden Gray, saying that Rees "is a very good man—any help would be appreciated."²²

In early October, I learned from several sources that Rees was all but selected. Drake informed me there were fifteen people interviewed for the vacancy—more than for any other vacancy in the country. She emphasized just how stellar Rees's legal credentials were. His Vietnam service, which earned him a Silver Star for gallantry, and his campaign work for the President surely weighed on his side of the scale too. By the seventeenth of October, the story broke in Jackson that his nomination was imminent.²³

President Bush called those he nominated for Circuit Court vacancies to express his best wishes. The formal nomination came on Friday, November 17, 1989.²⁴ The next day, Rees was

²² BILL MINUTAGLIO, *FIRST SON: GEORGE W. BUSH AND THE BUSH FAMILY DYNASTY* 234 (1999) (quoting letter from George W. Bush to C. Boyden Gray (Aug. 14, 1989) (on file with George Bush Presidential Library)).

²³ James Ricketts, *Jackson Lawyer is Apparently in Line for Appellate Judgeship*, CLARION-LEDGER (Jackson, Miss.), Oct. 18, 1989, at 1B.

²⁴ *Bush Nominates Jackson Lawyer to Fill Vacancy on Court of Appeals*, CLARION-LEDGER (Jackson, Miss.), Nov. 18, 1989, at 3B.

out on a run when a White House operator called his house to give the alert that he should be ready for the call. Rees was found and driven home. President and nominee did not link up for several hours, but the call was worth it.

Rees was not controversial. The American Bar Association rated him "Well-Qualified" for the position,²⁵ as he certainly was. The two Mississippi senators introduced him to the Senate Judiciary Committee at his hearing on February 27, 1990. Senator Cochran said he had "never known anyone who has had a better mind . . . intelligence . . . a greater degree of integrity and character. . . . He is one of Mississippi's most outstanding lawyers and citizens."²⁶ The Committee chairman was Senator Joe Biden, but he was not present. Only two members were there to question Rees, Democrat Dennis DeConcini and Republican Strom Thurmond. In the hearing room, Rees told me that any disappointment he might have that only two senators attended was more than offset by the fact the quiet hearing meant his nomination had drawn no opposition. I would later experience how right he was.

After the hearing, Rees's brother Tom hosted a reception at the Monocle, a restaurant on Capitol Hill. Justice and Mrs. Byron White were present, which was a wonderful gesture by the Justice for whom Rees had clerked from 1972 to 1973. Also present were individuals from the White House and Justice Department who had been instrumental in his nomination. Reported out of Committee without dissent on March 8, 1990, Rees was confirmed unanimously the next day, five-plus years since his effort began.²⁷ At the time, that seemed an impossibly long wait. New colleague Grady Jolly was quoted in a newspaper story on the confirmation: "Rhesa Barksdale is clearly a very bright, very hard-working, ambitious, clear-thinking lawyer,

²⁵ STANDING COMM. ON THE FED. JUDICIARY, AM. BAR. ASS'N, RATINGS OF ART. III JUDICIAL NOMINEES, 101ST CONGRESS (1990), available at <http://www.abanet.org/scfedjud/ratings/ratings101.pdf> (last visited Feb. 19, 2010).

²⁶ Joe Atkins, *Senators Tout Jacksonian for Federal Court*, CLARION-LEDGER (Jackson, Miss.), Feb. 28, 1990, at 1B.

²⁷ Joe Atkins, *Senate Panel OKs Barksdale as Circuit Judge*, CLARION-LEDGER (Jackson, Miss.), Mar. 9, 1990, at 1A; Joe Atkins & Michael Rejebian, *Senate OKs Barksdale Judgeship*, CLARION-LEDGER (Jackson, Miss.), Mar. 10, 1990, at 1A.

and I think he'll translate those qualities into a fine judge."²⁸ All that proved valid.

After confirmation, the Senate formally notifies the President of its advice and consent. The President then signs the commission of appointment. The effect of a signed commission's not being delivered to the confirmed nominee was the central legal issue in *Marbury v. Madison*.²⁹ There was no risk of a refusal to deliver the Barksdale document, but the facts of *Marbury* are an indication of the importance of the actual commission. President Bush signed the commissions of Rees and Jacques Wiener on the same day, March 12, 1990. The date of the commission is the relevant date for determining seniority on the court; when judges have the same commission date, the older one is senior.³⁰ So Rees has always been junior to the slightly older Wiener.

The new judge's formal investiture was held on June 1, 1990. The event was the public celebration of his appointment; his service on the court had actually begun just days after confirmation. Supreme Court Justice Byron White did the honors of administering the oath a second time. Justice White described Rees as "a good law clerk. He had a good sense of humor and he was fun to work with. . . . He couldn't type well . . .," though, the Justice noted.³¹

I was happy and even proud to have played a small part in the nomination Rees finally received after so many years of waiting. Somewhere in the course of all this, he started to refer to me as his "bobo." He recently reminded me that he adopted the word only after I told him that this was a Louisiana term for a great friend. I have no recollection of where I heard that, but the name was and has remained an honor.

In the years ahead, starting little more than a year after Rees's confirmation, my own long journey to the court began. Rees's support of me in that endeavor began at the same time and never wavered. On July 9, 1991, the marvelous judge for

²⁸ Atkins & Rejebian, *supra* note 26, at 1A.

²⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³⁰ 28 U.S.C. § 45(b) (2006).

³¹ Marky Aden, *Jackson Lawyer Takes U.S. Court Oath*, CLARION-LEDGER (Jackson, Miss.), June 2, 1990, at 1B.

whom I had clerked, Fifth Circuit Chief Judge Charles Clark, announced his retirement effective in January.³² My first call to Rees about my pursuit of the seat occurred less than a week later. I wrote a note in a ledger of sorts about the call: "7-16-1991. Called Rees, asked about details of his appointment and Louisiana 'claims' [to the Clark seat]. He said I was not only the best candidate, but only one."³³ I loved talking to Rees.

When I interviewed at the Justice Department a few months later, the first questioner was then Deputy Solicitor General, now Chief Justice, John Roberts. He asked me to name three people whom I would like to see on the Supreme Court. With an apology for sounding clumsily ingratiating towards my next interviewer, I listed Solicitor General Ken Starr first. Had I been more insightful, I would have named Roberts. I then added Fifth Circuit Judges Rhesa Barksdale and Patrick Higginbotham to the list. I still believe all three were excellent choices.

The 1991 effort did not work out for me or anyone else, as no one was nominated. George Bush was defeated by Bill Clinton in November 1992. A few years later, Louisianan James Dennis was appointed to the Clark seat. In the following years, Rees remained the perfect friend as I became a serial pursuer of a nomination to the Fifth Circuit. He encouraged, commiserated, and otherwise helped sustain me. When I was finally nominated for the Fifth Circuit on January 9, 2007, I went to the courthouse to tell Rees. I think he was as excited and delighted as I was. He helped keep me emotionally afloat over the eight-plus months of a stormy voyage. The storm began with the gale-force winds I encountered at my Judiciary Committee hearing in May, quite a contrast to Rees's calm hearing in 1990.

Rees's comments in conversation or emails were often just what I needed at the time. When one of the early unexpected delays occurred (before delay became the expectation), Rees wrote that such a failure was "hard to believe. Sad, sad, sad.

³² Andy Kanengiser, *Respected Appeals Judge Plans to Retire After 22-Year Stint*, CLARION-LEDGER (Jackson, Miss.), July 10, 1991, at 1B.

³³ Memorandum for file by author (July 16, 1991) (on file with author).

This WILL happen . . . just not as soon as it should have.”³⁴ He closed by saying he was looking “forward to that happy day” when I was confirmed. The elusive destination was reached with confirmation on October 24, 2007.³⁵

On the thirtieth of October, Rees swore me in. My wife Sharon stood alongside me, holding a family Bible. Rees’s role could not have been more fitting. For several days, I even worked out of his office as some space was made available elsewhere in the courthouse.

About five weeks later, I had my first set of oral arguments as a Fifth Circuit judge. Joyously, I did so as a member of a panel with Rees and Jim Dennis. In the New Orleans courtroom, with my wife in the audience and the advocates ready to start, the three of us walked in and took our places on the bench. Rees was in the center, presiding. Before the arguments began, he welcomed me to the court. He noted Sharon’s presence in the courtroom and said excessively complimentary things about me. More than just expressing a colleague’s welcome, he was expressing a wonderful friend’s, a bobo’s, shared joy about my finally being with him on this historic court.

He even wrote Sharon a brief note from the bench and had the bailiff deliver it to her. “So delighted you and Leslie are part of our court family,”³⁶ he wrote. Rees, Grady, and the other judges have actually made arrival similar to joining a family.

As Rees’s nomination struggles reflect, he required perseverance and an emotional balance to remain standing after the first four years of the contest. Once the multi-year political battles among the three states of the Fifth Circuit were resolved, Rees’s final victory was gained because his surpassing legal abilities were clearly recognized by those making the selection. A less steadfast and able person would not have made it

³⁴ Email from Judge Rhesa Barksdale (Dec. 7, 2006, 5:42 PM) (on file with author). The email was Judge Barksdale’s response to my letting him know that the Senate would likely adjourn for the year without voting on any of the thirteen district court nominations, including mine, that had been reported out of the Judiciary Committee and were awaiting a floor vote.

³⁵ David Stout, *Senate Backs Disputed Judicial Nomination*, N.Y. TIMES, Oct. 25, 2007, at A17.

³⁶ Note from Judge Rhesa Barksdale to Sharon Southwick (Dec. 5, 2007) (on file with author).

through, and nineteen years later we would not be celebrating the completion of the first phase of his contributions to the court.

In describing briefly his enormous role in my own struggle, I shine light on something else about Rees—his exceptional gift for friendship.

There are so many ways to gain perspective on remarkable people. Their contributions are often so multifaceted that seeing all their qualities requires viewing from many different angles. I have offered my personal angle.

God speed, young friend.



A PORTRAIT OF THE JUDGE AS A YOUNG MAN

*David E. Kendall**

Judge Barksdale is today a respected, distinguished, dignified, accomplished jurist with a sterling record in private practice and as a judge on the United States Court of Appeals for the Fifth Circuit. His opinions are the subject of scholarly analysis and comment, and his law clerks revere him. This reputation is well-deserved, but its sobriety omits one of the Judge's most salient, if usually concealed, characteristics: his sense of humor.

I first met Rhesa Barksdale in June 1972, as I was preparing to leave my Supreme Court clerkship with Justice White and Rees was preparing to replace me and begin his stint as one of the Justice's three law clerks. I was the first of my trio of October Term 1971 clerks to leave, and I was in a hurry to escape to Europe with my wife on Air Iceland and blow all of the retirement funds that had been deducted from my salary that year.¹ I handed off to Rees some especially long and thorny certiorari petitions (mostly concerning patents) which I had been trying to avoid reviewing and made my escape. He accepted the petitions with grace and good humor.

I reconnected with Rees when I returned in the early fall of 1972, while I was waiting to go into the Army. I had only a vague idea of what Rees himself had done in the Army,² although I did know that he was in the same West Point class as another friend of mine, Wes Clark, and was a good friend of

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¹ Supreme Court law clerks earned \$15,000 a year at that time, which a few years earlier had been the starting salary for young lawyers on Wall Street.

² Not until I read David Case's essay for this volume did I realize how truly distinguished Rees's military service had been. Consistent with his personal reticence about his own achievements, he never said a word to indicate the many combat decorations he had won. He would be the last person on the planet ever to appear on a televised "reality" show!

Wes's. I saw Rees a number of times during his clerkship years and thereafter at Justice White law clerk reunions, which occurred during ski season and were often held, quite by chance, in Denver. I also heard a number of stories about Rees from one of his co-clerks, Bob Barnett (my long-time law partner in later years), some true, some merely plausible, but due to my litigation experience with the law of libel pertaining to public figures, I think it better that I not relate those.

Caution thus prevents me from relating many of the incidents having to do with Rees's exploits as a Supreme Court law clerk. For example, I do not intend to say anything about his skill at shooting rubber bands, which won him such fame during October Term 1972. Both Justice White and his law clerks tended to be intensely competitive, whether at work or at play, and one of the games to relieve the tedium of reviewing long, boring certiorari petitions was to shoot rubber bands up into the large glass bowl of the ceiling light fixtures. The Justice would occasionally flip rubber bands with his clerks, and success in the game meant that the room gradually darkened, as the layer of rubber bands began to mask the light from the bulbs. Rees's fame derives, however, not simply from his skill at successfully having his rubber bands land in the bowl, but to the fact that on one memorable day in January 1973, his last rubber band topped the pile, touched the light bulb, caught fire, and caused the pile of rubber bands to begin smoldering and smoking. Court security personnel rushed in to douse the melting mass of India rubber. Happily for his later career, the evidence that Rees's rubber band was the incendiary culprit was consumed in the general conflagration.

Rees was intense, hard working, energetic and smart, but his good humor and sense of humor were unique among Supreme Court law clerks, who tend frequently to be a dour and relentlessly sober lot. Rees was a master deadpan artist of the tall tale, frequently involving a Southern locale and people with unlikely names, packaged in the guise of fact. The twinkle in his eye was the only giveaway. During my Term, one of the more unusual duties of a Justice White law clerk had to do with obscenity cases. At that time, the determination of obscenity was governed by the First Amendment "constitutional fact" doc-

trine,³ and this meant that the Justices (those who did not believe that the First Amendment barred all obscenity prosecutions) had to view each and every film prosecuted. Screenings of the films were scheduled, and the films were shown in one of the Court's high ceilinged and chandeliered conference rooms, with oil paintings of past Justices soberly staring down from the walls. The antics displayed on these films were anything but sober, however. Justice White often delegated to his law clerks the task of viewing the films and then reporting to him on the films' precise content. Unfortunately, Rees never had the opportunity to make these reports, since during his Term the Court decided *Miller v. California*,⁴ ruling that obscenity standards were largely a matter of state not federal law. Sadly, given Rees's narrative talents, his sense of humor, and his abilities to asymptotically approach the outlandish while reporting the factual, the Justice—and Chambers history—was deprived of the truly amazing reports on such films that I am sure he would have written.

Rees also relished the ironies of history, and pointed out to me in the late spring of 1973, when he was guiding me around West Point, that George Armstrong Custer had graduated thirty-fourth in his 1861 class of thirty-four at West Point. In the museum, Rees also showed me Custer's last note, written in pencil on a scrap of paper and sent out of the Little Big Horn: "Come on. Big village. Be quick. Bring packs."

I think everyone who clerked for Justice White was influenced by the Justice's use of the Socratic method. He was a master of asking question after question and by an inductive method coming to a decision about the case before him, which also left him with a good sense of how he could decide other cases not before him. This process extended to Saturday lunches at the Monocle and the Market Inn. I am sure that Rees's own style as a judge was influenced by this relentless verbal pounding and probing. After the Justice retired in 1993, I know that

³ See, e.g., *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (appellate court must "examine for [itself] the statements in issue and the circumstances under which they were made" to determine whether the speech is protected by the First Amendment).

⁴ 413 U.S. 15 (1973).

he greatly enjoyed sitting with the Fifth Circuit on panels of which Rees was a member. The Justice once remarked at a law clerks reunion banquet that he had delighted in writing a dissent from one of Rees's opinions.

Rees also learned important life lessons from Justice White on another court, what the Supreme Court clerks called the real "highest court in the land," the basketball court which sits immediately atop the Supreme Court's formal and majestic hearing chamber. The roof of the basketball court was low, so outside shooters had to take this into account. The Justice had won twelve varsity letters at the University of Colorado, in football (for which he was most famous), basketball, and track. For a long time, the Justice would play full-court basketball with the decades-younger law clerks and more than hold his own. During Rees's term, he most often played half court, two-on-two with his three law clerks. Guarding the Justice proved to be a memorable if hazardous experience. Driving to the basket, the Justice was wont to push, shoulder, elbow, and shove his way in for a lay-up. After playing defense against the Justice, Rees observed more than once (respectfully, not critically, of course) that he was not certain if the Justice fully appreciated the difference between the rules of football and basketball. But in the final Chambers tournament of twenty-five games, played at the end of October Term 1972, the Justice chose Rees to be on his side, and that team won the contest, playing against the other two clerks, by a margin of 13-12.

Rees's fabulous sense of humor was present at all times, although he was usually careful to keep it under wraps. While Rees wrote a scholarly tribute to Justice White which appeared in the *Harvard Law Review* after the Justice retired,⁵ he also wrote an essay about Justice White for the Justice's children and grandchildren, after the Justice died, as part of a tribute volume, and one of his reminiscences about the Justice says as much about Rees as it does about the Justice. It is far too good to paraphrase. Rees wrote:

⁵ Rhesa H. Barksdale, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3 (1993).

In January 1973, as Richard Nixon's second inaugural approached, I started fantasizing about all of that year's clerks being in the parade. In my junior year at West Point in 1965, I had marched in LBJ's; and, among other things, I had been struck by the fact that, when passing the reviewing stand, because it was on our left, we did "eyes left" instead of the usual "eyes right". So, I had pretty firm and fond memories of it. There were about 30 clerks that year, two of whom were women. Therefore, I imagined they would be our two major-ettes, in appropriate attire with batons, with the Chief Justice's chief law clerk as the drum major, with the customary tall, bearskin shako and staff and whistle; the other 27 of us would perhaps march in nine ranks of three. In any event, it would be a good, tight, disciplined formation. The expression on our faces would be stern and haughty, with our mouths in a downturned frown, akin to those of Russian honor guards. I never thought about, much less decided, what we in the rank and file would wear; looking back 30 years, perhaps black suits (not sure we all had one).

As we marched, we would be armed -- with a quill pen, which we would hold with the thumb and forefinger of our right hand at about shoulder height, elbow bent, dipping up and down. And, as we marched we begin the following cadence. On the step-off command, "SUPREME COURT LAW CLERKS, . . . FORWARD . . . MARCH", we would step forward with our left foot and begin, and repeat continuously, the cadence: "The pen is mightier than the sword; . . . the pen is mightier than the sword" One verse (pen mightier than sword) would take precisely two strides. Therefore, it would begin when our left foot hit on every third step.

As we passed the reviewing stand, containing the President and, I hoped, The Chief Justice, on the command "EYES LEFT", we would shout: "Hail to the chief . . . and hail to you Mr. Chief Justice!" Our eyes would snap back to the front on the command "READY FRONT"; and we would revert to our pen-is-mightier cadence and continue down Pennsylvania Avenue, with a certain swagger and command presence belonging to only the finest and best drilled units.

My co-clerks . . . and I fine-tuned this fantasy, this story. We ironed out every detail (except those rank and file uniforms; looking back, how did we miss that?). Then, along came the

Justice; I recall vividly that he was standing by the table . . . near the east door at the hall, into the law clerks' office. Because he was such a team-player and loyal colleague to the other Justices, we had never heard him utter a disparaging, much less critical, remark about them. But, I think somehow we knew the Justice was no respecter of pomposity. So, one of us mentioned that we had come up with this idea for a Clerks' Unit in the inaugural parade. And so we began describing it to him; no doubt thinking he would enjoy the tale, but certainly not sure about what his total reaction would be. Soon after the tale began, he started laughing; by the end, he was laughing so hard, he was shaking. I never [saw] him laugh so hard . . . before or since. . . .

That would have been a mighty fine parade.⁶

Now that Judge Barksdale has many law clerks of his own, is it too much to hope that at the next Inauguration, representing the Fifth Circuit and marching smartly in close order drill, will be the Barksdale clerks, shouting "Hail to the Chief . . . and hail to you Judge Barksdale" as they pass the reviewing stand?

⁶ Rhesa Barksdale, *Recollections by Rhesa Hawkins (Rees) Barksdale*, at 2-4 (2002) (proper nouns, printed in all caps in the original document, have been changed to title-case type to enhance readability) (on file with the Mississippi Law Journal).

SOME THEMES FROM JUDGE RHESA H. BARKSDALE'S PUBLISHED OPINIONS

*Christopher R. Green**

It is a great honor to have served the Judge as a law clerk and now to serve his law-school alma mater as a professor. It perhaps testifies to my own unnatural taste for academic pursuits that I could think of no better way to express admiration and thanks to the Judge for his work on the Fifth Circuit than to read and review as many of his published opinions as I could. As he takes senior status, his energy in contributing to the continuing work of the Fifth Circuit will certainly be greatly missed both by the bar and by his colleagues on the court. His contribution to the law is, however, a permanent legacy that his (semi-) retirement cannot erase or diminish. A full exposition of Judge Barksdale's over 350 additions to F.2d and F.3d in his over 19 years on the Fifth Circuit is, alas, quite impossible. As large as this legacy is, a review merely of the Judge's authored opinions neglects important elements of his Fifth Circuit work, particularly his work in collaborating in other judges' opinions and in resolving a great many disputes through unpublished opinions. His opinions are, however, his main public contribution to the growth of the law, and so a fitting place to focus.

Judge Barksdale has not articulated a judicial philosophy in so many words. His approach to judging is displayed less in explicit theorizing or philosophizing than in the patterns that emerge out of the myriad issues and cases with which he has dealt, carefully and methodically, in his time on the Fifth Circuit. While Professor Lund has addressed several themes related to the importance of lawyers to the Judge's approach to his work, I will cover his concern for the use and abuse of the court system, his largely-textualist approach to interpretation, and his approach to constitutional issues.

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I. THE USE AND ABUSE OF COURTS

Judge Barksdale is a firm believer that the law, like the Rules of Civil Procedure, should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."¹ Judge Barksdale has a clear antipathy to litigants playing games with courts, particularly by changing their story in the middle of litigation, or between trial and appeal. Even absent actual ill will by litigants and lawyers in particular cases, he has always displayed particular sensitivity to the possibility that certain rules may *foster* gamesmanship. I will consider plain error, bankruptcy fraud, the diligent pursuit of habeas claims, and his attitude toward excessive litigation.

A. Plain Error

Appellate judges are not, Judge Barksdale stressed to us on the first day of our clerkship, "knights-errant," searching for error to correct.² Absent exceptional circumstances, only issues presented to the district court and to the Fifth Circuit may be considered.³ Working for the judge, I saw the importance and

¹ FED. R. CIV. P. 1. The Judge has quoted these words (or earlier versions of them) many times. *See, e.g.*, *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 502 (5th Cir. 2007) (en banc) (Barksdale, J., dissenting); *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 488 (5th Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1423 (5th Cir. 1996) (en banc); *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993); *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 518 n.10 (5th Cir. 1993).

² The Judge quoted BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921) ("The judge . . . is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."); *see Unites States v. Brace*, 145 F.3d 247, 256 (5th Cir. 1998) (en banc) (applying Cardozo's dictum to plain error standard).

³ One early factor possibly contributing to the Judge's vigilance about plain-error standards of review may have been the en banc review of his opinion in *United States v. Vontsteen*, 910 F.2d 187 (5th Cir. 1990), *aff'd*, 950 F.2d 1086 (5th Cir. 1992), rejecting a vindictive-resentencing-on-remand claim. The Judge noted that the government had not suggested the applicability of plain-error standard until oral argument, and so the Judge considered the issue under the ordinary standard, *id.* at 194 n.5, but when the case was reheard en banc, the Court relied heavily on the plain-error standard, stressing that even if the government fails to point out the plain-error standard, such a forfeiture of the forfeiture issue should not control the Court. *See United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc, per Davis, J.) ("[N]o party has the power to control our standard of review," citing cases from other circuits). Of course, because the

function of the plain-error standard very early in my clerkship, because in looking at a new case, I soon learned to read the district court's treatment of an issue first, before reading the parties' differing spins on the issue. Of course, issues not raised at the trial court will not *have* such an opinion, and the appellate court's job is obviously much harder where it is starting from scratch. Conservation of appellate resources and the very function of allowing both trial-court and appellate scrutiny require a rule like plain error.⁴ As the Judge put it in his 1996 dissent in *Ho*, a case involving whether seeing a plain plastic card provided Fourth-Amendment probable cause, "[W]e do not require, nor can we expect, district judges to be mindreaders, or to conjure issues that might, or should, have been raised."⁵ He elaborated:

This new issue should have been resolved initially in the district court, where evidence is presented and tested, instead of here, where the majority has to base its holding, in part, on its own experience with the use of plastic cards. As oft stated, this is no way to run a railroad; nor is it any way to run our judicial system. In short, the newly raised issue should be reviewable only for plain error.⁶

The Judge briefly explained the purposes of the plain-error standard in *Moody* in 1991:

defendant did not prevail before Judge Barksdale's panel even under the ordinary standard, the panel's decision about plain error was not outcome-determinative. When the case was reheard en banc, however, some of the judges in the majority might have felt the case close enough that the change in standard of review made a difference. Four judges dissented from the en banc decision. *Id.* at 1093-95 (Clark, C.J., joined by Politz, King, and Jolly, JJ.).

⁴ The Judge's concern for multiple independent analyses of an issue extends to the procedures he follows for oral argument. Rather than relying on a single clerk's bench memo circulated to all three judges on the panel, he has insisted on his clerks writing summaries of all of the cases to be heard at oral argument, lest the three judges find themselves "singing from the same song sheet," as he explained it on our first day. While the Judge would surely be loath to put it in such esoteric terms, his intuition about the value of independent review is reflected in the Condorcet Jury Theorem, which shows in mathematical terms how a group's decisions can under certain conditions be more reliable than any of the individuals composing it. Individuals' decisions must, however, be independent. See, e.g., CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS 8-9 (2009).

⁵ *United States v. Ho*, 94 F.3d 932, 940 (5th Cir. 1996) (Barksdale, J., dissenting).

⁶ *Id.* at 938-39. "No way to run a railroad" is a common Barksdalism, though this is apparently the only time it made its way into an opinion.

The salutary purposes for the plain error standard, especially in the context of failing to contemporaneously object to a proposed jury instruction—and most especially for areas of the law (bankruptcy and trusts) and a trial as technical and precise as are involved here, are obvious. Accordingly, there must be more than error; there must be plain error—a justifiably higher, and more demanding, standard.⁷

In *Maldonado* in 1995, in response to the government failing to point out the plain-error issue, the Judge admonished:

It is imperative that parties to an appeal be vigilant in ensuring that we are advised whether an issue is being presented for the first time on appeal. Although we review the record for that purpose, this review, obviously, occurs only after the briefs have been filed. Needless to say, the briefs should cover this point, not only because we want the benefit of the parties' review of the record (in that they tried the case, they should know it best), views, research, and opinions on this point, but also because this point drives numerous factors critical to appellate review, including the standard of review and questions asked at oral argument.⁸

Several of the Judge's opinions have helped clarify exactly what plain error is and when the standard applies. The Supreme Court clarified the basic doctrine in *Olano* in 1993: (1) error, that is (2) plain, (3) prejudicial, and (4) in the discretion of the reviewing court, "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."⁹ Judge Barksdale has worked diligently both to apply *Olano* and to consider carefully other issues related to plain error doctrine.

Rodriguez in 1994 noted that one early short form of the plain-error standard, referring only to purely-legal issues whose resolution would prevent manifest injustice, was inconsistent with *Olano*; review under such a standard would both be too narrow (suggesting that determinations of fact could never constitute plain error) and too broad (suggesting that manifest in-

⁷ United States v. Moody, 923 F.2d 341, 348 (5th Cir. 1991).

⁸ United States v. Maldonado, 42 F.3d 912 n.9 (5th Cir. 1995).

⁹ United States v. Olano, 507 U.S. 725, 732 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

justice is the only consideration for purely-legal questions).¹⁰ Later in 1994, *Calverley*, now the Fifth Circuit's leading case on the plain-error standard, credited *Rodriguez* with "fore-shadow[ing] today's decision."¹¹ The same two basic issues—the law/fact distinction and the "manifest justice" formulation—were involved in the Judge's 1995 panel and 1996 en banc opinions in *Douglass*. His panel opinion noted that circuit precedent allowed de novo review at the Fifth Circuit of legal issues not brought to the attention of the district court after a proceeding before a magistrate judge; only factual issues were subject to the plain-error rule.¹² On en banc review, the Judge made clear that factual and legal issues are held to the same standard,¹³ also making clear that "manifest injustice," which had appeared in many opinions as a separate basis for reversal, was not a separate inquiry from the plain-error standard.¹⁴

Martinez in 2002 considered in some detail whether to consider a new claim on appeal based on intervening Supreme Court precedent.¹⁵ The Judge found "no sound reason to depart now from our long established course of refusing, absent extraordinary circumstances, to entertain legal issues raised for the first time on appeal,"¹⁶ noting that in *Martinez* itself the law was "not so settled prior to [the recent Supreme Court case] that raising her . . . claim in district court would have been pointless or futile."¹⁷

¹⁰ *United States v. Rodriguez*, 15 F.3d 408, 416 n.10 (5th Cir. 1994).

¹¹ *United States v. Calverley*, 37 F.3d 160, 163 (5th Cir. 1994) (en banc).

¹² *Douglass v. United Servs. Auto. Ass'n*, 65 F.3d 452, 456-58 (5th Cir. 1995).

¹³ *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1421-23 (5th Cir. 1996) (en banc).

¹⁴ *Id.* at 1423-28. Just as the Judge was concerned to avoid the sand-bagging incentives posed by issues first raised on appeal, he was concerned about unfair surprise to the litigants caused by the Fifth Circuit's own change of course. Accordingly, he applied his new rule only prospectively, to litigants who had been specifically warned of the consequences of a failure to make objections to the district court. *Id.* at 1429.

¹⁵ *Martinez v. Tex. Dep't of Criminal Justice*, 300 F.3d 567, 573-75 (5th Cir. 2002).

¹⁶ *Id.* at 574.

¹⁷ *Id.* at 574-75. Several of Judge Barksdale's other opinions reflect a similar sensitivity to the fact that the law changes, but litigants cannot be expected to anticipate future changes in the law. The Judge has never been unduly swayed by the common-law fiction that courts declare the law as it has always been. Courts therefore struggle not only to clarify the present state of the law, but must in several contexts assess the reasonableness of an action in light of the prior state of the law.

The Judge's en banc opinion in *Brace* in 1998 illustrated the fact that issues must be raised to the district court (and on appeal) in adequate detail, distinguishing a defendant's generic entrapment claim that he was not predisposed to commit a crime from the claim to lack "positional predisposition" (i.e., *ability*, as opposed to mere willingness, to commit a crime had the government not acted). Accordingly, plain-error forfeiture and failure-to-brief waiver applied to this second issue, even though the generic predisposition issue had been raised below and briefed to the Fifth Circuit.¹⁸

Several of his opinions discuss in depth the *Teague* non-retroactivity doctrine for habeas cases, according to which (subject to two frequently-litigated exceptions) a federal court may only release a prisoner if a result is "dictated by precedent" when a conviction becomes final. See *Davis v. Scott*, 51 F.3d 457, 466-67 (5th Cir. 1995); *United States v. Shunk*, 113 F.3d 31, 35-37 (5th Cir. 1997); *Burdine v. Johnson*, 231 F.3d 950, 953-58 (5th Cir. 2000); *Henderson v. Quarterman*, 460 F.3d 654, 663-64 (5th Cir. 2006); *In re Smith*, 142 F.3d 832, 835-36 (5th Cir. 1998) (considering retroactivity-related limits on successive habeas petitions in AEDPA).

In qualified immunity cases, he has stressed the fact that law must be clearly established at the time of an injury, not merely at the time of an appeal, in order to overcome qualified immunity. See *Dunn v. Denk*, 79 F.3d 401, 404 (5th Cir. 1996) (en banc) (Barksdale, J., dissenting in part) (stressing the time at which qualified immunity was to be assessed, i.e., between *Johnson v. Morel*, 876 F.3d 477 (5th Cir. 1989) (en banc), and *Hudson v. McMillan*, 503 U.S. 1 (1992)); *Dunn v. Denk*, 54 F.3d 248, 253-56 (5th Cir. 1995) (Barksdale, J., dissenting) (same); *Foster v. City of Lake Jackson*, 28 F.3d 425, 428-29 (5th Cir. 1994) (key for qualified immunity is "pre-existing law"); *Kiser v. Garrett*, 67 F.3d 1166, 1171-73 (5th Cir. 1995); *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998) (italicizing "clearly established at the time of the incident" and "as it existed" in qualified-immunity standard); *Spann v. Rainer*, 987 F.2d 1110, 1115-16 (5th Cir. 1993) (denying qualified immunity because law on excessive force was sufficiently precise at the time of injury); *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 n.5 (5th Cir. 1992) (key is "the law as it existed at the time of the conduct in question"); *Kinney v. Weaver*, 301 F.3d 253, 287 (5th Cir. 2002) (Barksdale, J., dissenting) (italicizing "several years ago" in the qualified-immunity standard); *id.* at 291 (italicizing "existing" law in qualified-immunity standard.)

Finally, he has addressed when intervening authority would support a remand for more evidence, as opposed to applying new law to an old record. See *Deffenbaugh-Williams v. Wal-Mart*, 188 F.3d 278, 282 (5th Cir. 1999) (reconsidering earlier opinion in light of *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999)) ("When law changes in unanticipated ways during an appeal . . . this court will generally remand for a new trial to give parties the benefit of the new law and the opportunity to present evidence relevant to that new standard. The motivation of this rule is fairness: to prevent injustice to a party who had no reason to expect a changed rule at the time of trial."); *Hill v. Int'l Paper Co.*, 121 F.3d 168, 173, 177 (5th Cir. 1997) ("dramatic change in Mississippi premises liability law" requires remand "in fairness to the court and the parties . . .").

¹⁸ *United States v. Brace*, 145 F.3d 247, 255-61 (5th Cir. 1998) (en banc). The Judge has enforced inadequate-briefing waiver per FED. R. APP. P. 28(a)(9)(A) ("the argument . . . must contain . . . [a party's] contentions and reasons for them, with citations to the

The Judge's concern for plain-error doctrine has not merely served as a device for affirming more district-court judgments. The Judge has showed concern with the proper articulation of the plain-error standard of review even in cases where he would find the stricter standard satisfied, or in cases in that would be affirmed even under the more lenient normal standard.¹⁹ Despite his preference for brevity, he has also demonstrated his willingness to engage the proper-preservation issue at length.²⁰ Also, the Judge has not uniformly urged a narrower approach to plain error, but has sometimes argued in favor of broadening it.

authorities and parts of the record on which the [party] relies") many times. *See, e.g.*, *United States v. Abrams*, 947 F.2d 1241, 1250 (5th Cir. 1991); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1207 n.16 (5th Cir. 1992); *United States v. Kleinebreil*, 966 F.2d 945, 948 n.6 (5th Cir. 1992); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 242 (5th Cir. 1993); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520 n.5 (5th Cir. 1993); *United States v. Miles*, 10 F.3d 1135, 1138 (5th Cir. 1993); *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1490 (5th Cir. 1995); *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 172, 176, 179 (5th Cir. 2000); *Martinez v. Mukasey*, 519 F.3d 532, 545-46 (5th Cir. 2008).

¹⁹ *See, e.g.*, *United States v. Campbell*, 49 F.3d 1079, 1086 (5th Cir. 1995) (Barksdale, J., concurring) ("[I]t is most arguable that we should review the motion for acquittal/element of the offense issue only for plain error, because [the defendant] did not later object to the jury instruction on this point"); *United States v. Johnson*, 267 F.3d 376, 381 (5th Cir. 2001) (Barksdale, J., specially concurring) ("I cannot agree with the *ratio deciderendi*, especially the conclusion that the issue was adequately raised (preserved) in district court. It goes without saying that [the defendant's] counsel should have stated far more clearly his position (objection) concerning not being allowed to confer with his client during the two lengthy recesses. On the other hand, even reviewing the issue in the light most deferential to the Government . . . I would still reverse [the defendant's] conviction because, on this record, there was an obvious error that affected his substantial rights (Sixth Amendment right to counsel) and the fairness of this proceeding and, as a result, it is within our discretion to correct this error.").

²⁰ *See United States v. Ho*, 94 F.3d 932, 940 (5th Cir. 1996) (Barksdale, J. dissenting) ("numbing, but nonetheless necessary, detail"); *United States v. Maldonado*, 42 F.3d 906, 909 (5th Cir. 1995) ("necessary, considerable (and perhaps numbing) detail").

For other apologies for opinion length, see *Johnson v. Sawyer*, 120 F.3d 1307, 1338 (5th Cir. 1997) ("It is past time for this opinion to end."), and his not-so-concise opinion in *Concise Oil & Gas P'ship v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1464 (5th Cir. 1993) ("Both sides appeal, raising almost countless issues."). The Judge often expressed his sometimes-unfulfilled preference for brevity with a line he attributed to Churchill: "If I had more time, I would have written a shorter letter." The same or a similar line has been attributed to Blaise Pascal, Mark Twain, T.S. Eliot, Cicero, and others. For a collection, see <http://dangerousintersection.org/2006/04/12/more-time-shorter-letter/>. *Johnson* was the Judge's third-longest opinion, covering 32 pages of F.3d; his two longest were his 2001 en banc dissent in *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (45 pages of F.3d) and *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000) (37 pages of F.3d).

For instance, in *Graves* in 1993, he criticized the rule that a litigant must sometimes raise evidentiary issues twice to the trial court, first in making or opposing a motion in limine and second when evidence is introduced at trial. "Although it may seem redundant—as well as contrary to the underlying reasons for motions in limine—to require [a litigant] to object at trial after having unsuccessfully opposed the motion in limine, we are bound by a recent decision by this circuit that plainly requires [the litigant] to lodge a contemporaneous objection in order to preserve the issue for appeal."²¹ The Judge's resistance to superfluity at the district court was later vindicated in modifications to Evidence Rule 103.²²

Even where plain-error doctrine has not applied, the Judge has expressed displeasure when issues are raised for the first time on appeal. In considering an unforfeitable, unwaivable issue of subject matter jurisdiction, the Judge noted in *Muhamad* in 1999, a case concerning involuntary psychiatric commitment:

This notwithstanding [i.e., notwithstanding that the subject-matter-jurisdiction issue was non-waivable and non-forfeitable], we are troubled greatly by counsel filing the consent [to magistrate-judge jurisdiction], then participating in the commitment proceeding without any objection or notice that the magistrate judge lacked jurisdiction, and then making the claim, albeit one of jurisdiction, for the first time on appeal.

In short, this issue should have been presented in district court for a host of obvious reasons; these include ensuring that Muhamad received the most expeditious treatment (should she be found in need of same), and judicial efficiency and economy. While we do not question counsel's good faith in presenting the

²¹ *United States v. Graves*, 5 F.3d 1546, 1551 (5th Cir. 1993). The Judge did not urge en banc review because the difference in standard of review was probably not outcome-determinative (i.e., even under normal standards, *Graves* presented no reversible error), but recommended en banc reconsideration of the issue "in the appropriate case." *Id.* at 1553. Evidence Rule 103 was amended before such a case arose. See *infra* note 22.

²² See FED. R. EVID. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.") (adopted in 2000).

issue at this late date, we caution/note the obvious: this is no way to proceed. This issue should have been raised when this proceeding began approximately nine months ago.²³

B. Bankruptcy Abuse

The Judge's concern with plain error relates to litigants who at one point (i.e., before the trial court) fail to raise an issue, but then later (i.e., before the Fifth Circuit) claim that the issue is important. In *Coastal Plains* in 1999, Judge Barksdale addressed a structurally-similar problem in bankruptcy: the debtor who initially fails to list an asset or claim and then later seeks to enforce it. He considered the requirements for judicial estoppel, which prevents litigants from "playing fast and loose with the courts" by changing their position mid-stream,²⁴ holding that judicial estoppel has no affirmative bad-faith requirement for bankruptcy cases, and that "inadvertence" is only an exception where the debtor lacks either knowledge of a claim or motive for concealing it.²⁵ A similar case, *Baudoin* in 1993, holding that a claim that could have been raised before the bankruptcy court could not be raised later, featured a short ode to the finality promoted by *res judicata*, especially in the bankruptcy context:

[T]he numerous and substantial reasons for the doctrine of *res judicata* are too well known, and obvious, to bear repeating. And, they are all the more compelling today, especially for bankruptcy, and related, proceedings. Because of spiraling litigation costs, increasingly congested courts—especially bankruptcy courts—and expanding theories of recovery . . . , it is more imperative than ever that the doctrine of *res judicata* be applied with unceasing vigilance.²⁶

Several of the Judge's opinions consider other abuses of the bankruptcy process. The Judge's 2000 panel dissent and 2001 en banc majority opinion in *Mercer* concerned the application of

²³ *United States v. Muhammad*, 165 F.3d 327, 330 (5th Cir. 1999).

²⁴ *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)).

²⁵ *Id.* at 210-13.

²⁶ *In re Baudoin*, 981 F.2d 736, 740 (5th Cir. 1993).

the non-dischargeability-for-fraud rule of 11 U.S.C. § 523(a)(2)(A), holding that the use of a credit card is a representation of the intention to repay on which the credit card issuer might justifiably rely, even if the card was pre-approved and used primarily for gambling.²⁷ The purpose of bankruptcy, the Judge wrote, is to allow *honest* debtors a “fresh start,” but not fraudfeasors:

[T]he principle that exceptions to discharge are narrowly construed . . . seeks to further the goal of providing the debtor a “fresh start” By enacting § 523(a)(2)(A), Congress made clear its intent to limit the “fresh start” to honest, but unfortunate, debtors, *not* perpetrators of fraud.²⁸

Grothues in 2000 held that a tax-evasion plea-bargain promise to pay one’s taxes may not be avoided through bankruptcy, even for taxes that were not the precise subject of the earlier prosecution: “[H]olding otherwise might—indeed, probably would—encourage unscrupulous debtors to use bankruptcy law as a shield against enforcement of criminal proceedings promises they had no intention of keeping, but nevertheless made, in order to gain a more favorable plea agreement/sentence.”²⁹

C. *Burdine and Withheld Evidence*

Judge Barksdale’s 2000 panel opinion and 2001 en banc dissent in *Burdine*, the “sleeping lawyer” case, are, unfortunately, the only places that many people in the wider public have encountered him.³⁰ At issue was a narrow issue regarding the ap-

²⁷ *In re Mercer*, 211 F.3d 214, 222 (5th Cir. 2000) (Barksdale, J., dissenting), *rev’d*, 246 F.3d 391 (5th Cir. 2001) (en banc).

²⁸ *In re Mercer*, 246 F.3d at 407 n.17.

²⁹ *In re Grothues*, 226 F.3d 334, 339 (5th Cir. 2000).

³⁰ *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), *rev’d*, 262 F.3d 336, 357 (5th Cir. 2001) (en banc) (Barksdale, J., dissenting). For some of the popular-press mischaracterization of the case, see Clarence Page, *Of Sleeping Lawyers and a Death Sentence*, Ocala Star-Banner, Nov. 2, 2000, at 8B (characterizing the panel opinion: “If you nod off into a peaceful little slumber during the proceedings, no problem.”). Even in law reviews, the opinion has been characterized as approving the lawyer’s performance, which it did not. *E.g.*, Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 493 n.67 (2009) (characterizing the Court as “condon-

plication of Sixth Amendment ineffective-assistance-of-counsel rules to a state of uncertainty: when a lawyer has misbehaved egregiously during trial, but, because of the passage of time, it is not clear exactly *when* that misbehavior occurred, so that its effect can be assessed, is a criminal defendant required to show an actual prejudicial effect on his trial, or should a presumption of prejudice apply? In 1984 in *Cronic*, the Supreme Court held that the absence of counsel would be presumed prejudicial only if it occurred during a "critical stage."³¹ In *Burdine*, the en banc majority, echoing Judge Benavides's panel dissent, declined to hold that *any* portion of the trial counts as a critical stage, but instead held that, in the face of uncertainty, "repeated unconsciousness of [the defendant]'s counsel through not insubstantial portions of . . . [the defendant]'s capital murder trial warrants a presumption of prejudice. . . ."³² Judge Barksdale held that any such "not insubstantial" presumption-of-prejudice rule would count as new under the non-retroactivity rule of *Teague*, and that such a presumption was inappropriate if the time at which the attorney misbehaved could not be identified.³³

ing the 'assistance' of a lawyer who slept during a trial"); Rodney J. Uphoff, *On Misjudging and its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 544 n.134 (2007) (characterizing the Court as "finding lawyer who admitted sleeping through substantial portion of a capital murder trial effective"). Judge Barksdale plainly called Joe Cannon's actions "deplorable" and expressed "abhorrence at the spectacle." *Burdine*, 262 F.3d at 357, 358 (Barksdale, J., dissenting). Oddly, in addition to mischaracterizing the Judge's position, both Bernstein and Uphoff cite only the en banc decision, which applied a presumption of prejudice to *uphold* habeas relief, over Judge Barksdale and four other judges' dissent.

³¹ *United States v. Cronic*, 466 U.S. 648, 659 (1984).

³² *Burdine*, 262 F.3d at 349. Some commentators have, like Judge Barksdale, found the majority's formulation unclear. See, e.g., James M. Donovan, *Burdine v. Johnson—To Sleep, Perchance to Get a New Trial: Presumed Prejudice Arising From Sleeping Counsel*, 47 LOY. L. REV. 1585, 1603 (2001) (in combining tests from *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984), and *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996), the en banc court "leaves the issue of the applicable test at least as unresolved as it was when it took up the case, and perhaps it is left even murkier than when it began"); Donovan, *supra* note 32, at 1387 (en banc court "intertwined the *Javor* and *Tippins* tests, rendering unclear which test the Fifth Circuit has adopted"); Kristina G. Van Arsdell, *Burdine v. Johnson: The Fifth Circuit Wakes Up, but the Supreme Court Refuses to Put the Sleeping Attorney Standard to Rest*, 39 HOUS. L. REV. 835, 860 (2002) (agreeing with dissent that "any number of definitions can be assigned to the majority's 'not insubstantial' standard" and complaining that "the standard needs to be more specific").

³³ *Burdine*, 231 F.3d at 958. Judge Barksdale's resistance to presumptive prejudice has also won favor with some later courts. See, e.g., *The Last Word: Habeas Relief for*

Judge Barksdale's panel opinion noted the potential for abuse engendered by the defendant's long delay in making his claim:

[W]e are troubled, to say the least, by wide-ranging abuses that can result where, as here, a criminal defendant sits next to counsel during trial; makes *no* mention then of counsel sleeping during trial; requests that the same counsel represent him on direct appeal; and then, over ten years after trial, claims ineffective assistance because counsel slept during trial, despite defendant never, by affidavit or testimony, stating under oath that counsel engaged in such conduct.³⁴

As with plain error or bankruptcy, the Judge was loath to adopt a rule under which a litigant would benefit from uncertainty fostered by his own lack of diligence. The Judge's concern about rewarding a litigant's own creation of uncertainty was greatly compounded, however, when Burdine's lawyer publicly attacked the Judge's panel opinion on the ground that Burdine "kept trying to nudge his attorney awake."³⁵

Not only had Burdine failed to make his claim in a way that would have helped resolve the relevant uncertainty, but he had withheld evidence of his own activity during trial, permitting, as the Judge saw it, the negative inference that such evidence would have been unhelpful to Burdine's critical-stage *Cronic* claim.³⁶ The Judge viewed the late, extrajudicial presentation of evidence as an attack on "the integrity of our court and this proceeding."³⁷

Client of Sleeping Lawyer, but It Took a Long Time—and Not Every Court Agrees, 8 CRIMINAL PRACTICE GUIDE no. 4, July/August 2007, at 26 ("In the post-Florida v. Nixon era 543 U.S. 175 (2004)) [sic], courts have avoided *Cronic*'s deprivation-of-counsel stance and they have not followed the Fifth Circuit's lead [in *Burdine*]; rather, many courts require proof of when and how much of the trial counsel allegedly slept through and demand concrete proof of prejudice.") (citing *Vargas v. Piler*, 2006 WL 2067079 (E.D. Cal. Jul 24, 2006), report and recommendation adopted, 2006 WL 2781640 (E.D. Cal. Sep 23, 2006); *State v. Rosado*, No. 83694, 2005 WL 3436358 (Ohio App. 8 Dist. Dec. 15, 2005)).

³⁴ *Burdine*, 231 F.3d at 957.

³⁵ *Id.* at 365 n.7 (Barksdale, J., dissenting).

³⁶ *Id.* at 365-67 (Barksdale, J., dissenting).

³⁷ *Id.* at 366.

While the Judge's opinions in *Burdine* have been presented as the worst sort of toleration for breaches in judicial procedure,³⁸ the Judge's approach to the case actually reflects in important ways the same concern for the orderly, consistent, diligent presentation of claims that the Judge has repeatedly displayed in other cases. Judge Barksdale has insisted in a great variety of contexts that only claims brought to the attention of the court at all proper levels of review, and at the proper time, can be assessed fully and fairly by the courts. However unappealing it might be to seem to approve egregious errors when corrections are sought belatedly, and however tempting it might be to excuse delay where a late claim is particularly incendiary, as in *Burdine*, the Judge has always adhered strictly to his sense of the demands of protocol.

D. Civil Litigation and Summary Judgment

The Judge has been a big fan of the proper use of summary judgment to resolve litigation where there is no genuine dispute of material of fact, viewing it as a critical response to abusive litigation. He wrote in 1993's *Calpetco 1981*, allowing a district court to refuse to reopen a summary judgment in light of new affidavits,

[S]ummary judgment . . . has an important, and ever increasing, role in stemming the tide of explosive litigation, greatly congested dockets, increasing delay in claims being adjudicated, and spiraling—indeed, unimaginable—litigation costs. In short, it is one of the primary weapons in the Federal Rules of Civil Procedure arsenal Summary judgment, pursuant to the simple procedures established by Rule 56, serves, among other ways, to root out, narrow, and focus the issues, if not resolve them completely. Where, as here, partial summary judgment is granted, the length and complexity of trial on the remaining issues are lessened, all to the advantage of the litigants, the courts, those waiting in line for trial, and the American public in general. These are interests of great import, and if they are to be served, the Rules designed to sponsor and secure them must be followed and enforced. In short, a district

³⁸ See *supra* note 30.

judge must have considerable discretion in determining when enough is enough.³⁹

The Judge's concern for frivolous litigation was most memorably displayed in *Dawson*,⁴⁰ a 1995 opinion reversing sanctions against an Assistant U.S. Attorney for failing to make a settlement offer related to a prisoner who ran into a pole during a softball game. Judge Barksdale likened frivolous-litigation settlements to ransom payments. He noted, "In light of the increasing flood of prisoner litigation that threatens to submerge our courts, such a factor [encouraging other frivolous lawsuits] is extremely relevant, especially when the Government is the defendant and the taxpayers will be footing the bill for any settlement."⁴¹ He then added a footnote:

This brings to mind one of the principles learned early and painfully by our Nation (and it is hoped still taught early to schoolchildren), and enunciated in stirring fashion by Robert Goodloe Harper's toast at a banquet for John Marshall in 1798: "Millions for defense, but not one cent for tribute". The toast was attributed to Charles Cotesworth Pinckney, our minister in 1797 to the French Republic, who, when told that American commissioners in Paris to protest French attacks on United States shipping would be received only if they paid a \$50,000 bribe and loaned a large amount of money to France, replied, "Not a sixpence, sir". JOHN BARTLETT, *FAMILIAR QUOTATIONS* 367 (Justin Kaplan, 16th ed. 1992).

Because of such bullying by the British, and especially the French ("Quasi War"), Congress in 1797 authorized resumption of the construction of six frigates, including the famous, and much beloved, USS Constitution ("Old Ironsides"). (The ships' construction had been authorized originally in order to fight the Barbary pirates, who likewise sought to extort money from the infant United States.) THOMAS P. HORGAN, *OLD IRONSIDES* 12, 14, 24 (1963). In light of the matter before us, it is somewhat ironic that this proud ship, built at considerable expense as an alternative to monetary appeasement, bears the

³⁹ *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993).

⁴⁰ *Dawson v. United States*, 68 F.3d 886 (5th Cir. 1995).

⁴¹ *Id.* at 898.

name of the document which trumpets fundamental fairness for all, *even* Assistant United States Attorneys.⁴²

II. INTERPRETATION

Judge Barksdale has not been given to extended theoretical examinations of proper methods of interpretation. Nevertheless, a review of his opinions reveals his steady focus on the statutory text. Again and again, his statutory-interpretation opinions begin and end there. While some of these opinions might not count as “greatest hits,” the quick, efficient way in which they generally dispose of disputes on the basis of statutory or other text reveals a great deal about his approach to judging.⁴³ I will consider several examples where the Judge makes clear that statutory text ordinarily trumps policy, refuses to make the inquiry any more complicated than a straightforward statutory text, pays attention to the details—even very small details—of statutory language, resists the broad use of technical definitions contrary to ordinary usage, and applies textualism to contracts law. Finally, I mention the Judge’s prominent non-textualist use of the absurdity canon in his panel and en banc dissents in *Kinney*.

⁴² *Id.* at 898 n.21.

⁴³ Occasionally, the Judge will indicate that he could have stopped with the statutory text, but go on to examine legislative history or other material. *See, e.g.*, *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, 462 (5th Cir. 1994) (“We could stop here, because ‘[i]ndisputably, the goal of statutory construction is to ascertain legislative intent through the plain language of the statute—without looking to legislative history or other extraneous sources.’ But, when interpreting a statute as complex as the Wiretap Act, which is famous (if not infamous) for its lack of clarity, we consider it appropriate to note the legislative history for confirmation of our understanding of Congress’ intent.”) (alteration in original) (citations omitted); *United States v. Wake*, 948 F.2d 1422, 1431 (5th Cir. 1991) (“In reaching our reading of the statute, it is not necessary to look to its legislative history. This notwithstanding, our reading is entirely consistent with that history.”); *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 281 (5th Cir. 1998) (“Our reading, mandated by the plain wording of the statute, is confirmed by decision from at least 15 other States. . . .”); *Withrow v. Roell*, 288 F.3d 199, 203 (5th Cir. 2002) (“Because the statute’s language is plain, and its application does not lead to absurd results, we need not look to its legislative history. In any event, that history supports this construction.”). One possible explanation for such passages is that they distinguish cases that might hinge on interpretive theory from those that do not; where the legislative history and the text speak with the same voice, for instance, there is no need to resolve their general relationship in particular cases, although it is evident that in cases posing a genuine conflict, Judge Barksdale himself would adhere to text.

A. The Subordination of Policy Concerns

The Judge has several times confronted statutes in tension with what seemed to the Judge to be sound policy. However, where such tension has fallen short of the sort of absurdity that would warrant the inference that Congress could not have intended the result, the Judge has steadfastly followed what Congress has said rather than his own notions of policy.

Folse in 1995 held that the language of 9 U.S.C. § 10 (referring to "the district wherein the *award was made*" and to "an order vacating the *award*") allowed an arbitration process to be challenged in federal court only after it had been seen through to a final award, even though such a requirement imposed the same sort of costs that the arbitration process was designed to avoid. Clear statutory text trumped these concerns: "[I]t is more than unfortunate that the arbitration process, designed to resolve disputes in a timely and cost-efficient manner, has failed the expectations of at least one, if not both, of the parties. Nonetheless, our directive in this case is clear" ⁴⁴

Johnson in 1997 considered but rejected using the absurd-results canon in holding that the tax-return-confidentiality requirement in 26 U.S.C. § 6103(a) can sometimes apply to information that has been disclosed in court. Judge Barksdale noted the strong temptation to depart from the text: "At first—even second, third, or fourth—glance, it appears that, to find a violation of § 6103 for disclosure of tax return information that was in most, if not all, respects previously disclosed in a court proceeding, is to reach an absurd result." ⁴⁵ However, the Judge resisted this temptation on the basis of other parts of the statute that make explicit provision for information disclosed in court; given that material, "it is difficult to conclude that Congress' failure to include an exception for 'public record' tax return information in the exceptions to § 6103 was unintentional." ⁴⁶ Other circuits' approaches, while admittedly attractive to the

⁴⁴ *Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603, 606 (5th Cir. 1995).

⁴⁵ *Johnson v. Sawyer*, 120 F.3d 1307, 1319 (5th Cir. 1997).

⁴⁶ *Id.* at 1321.

Judge on policy grounds, unfortunately “fl[y] in the face of § 6103.”⁴⁷

Whitehead in 1998 considered whether the joint-and-several-liability-limiting statute in Miss. Code Ann. § 85-5-7 applied when a defendant tortfeasor’s negligence combined with a third party’s intentional criminal behavior. The statute provided that in general, a tortfeasor would pay only “the amount of damages allocated to him in direct proportion to his percentage of fault,” while also providing that “[f]ault’ shall not include any tort which results from an act or omission committed with a specific wrongful intent.” The obvious sort of motivation for the “fault” definition was to keep intentional tortfeasors from reducing their liability if their intentional misbehavior combines with another’s actions to produce an injury. However, Judge Barksdale held that because the apportionment language’s reference to “percentage of fault” was also limited by the unqualified no-intentional-torts definition of “fault,” a negligent defendant also could not reduce his liability where the third-party contribution was intentional, even though there was no obvious policy fostered by that exclusion.⁴⁸

Krieser in 1999 held that in requiring post-judgment interest to run from “the date of the entry of the judgment,” 28 U.S.C. § 1961 did not allow a district court who erroneously delayed the entry of judgment for four months to correct his mistake by ordering post-judgment interest to run from the date of the verdict.⁴⁹ While the Judge noted that “the district court reasoned understandably that [the plaintiff] should not be penalized for a delay which he did not cause,”⁵⁰ and recognized “the powerful intuition that a plaintiff should not be deprived of his judgment earning interest during a delay which he did not

⁴⁷ *Id.* at 1322.

⁴⁸ *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 281 (5th Cir. 1998). Judge Barksdale’s relatively swift application of the statutory text might be usefully contrasted with the much more extensive analysis by Judge Southwick, now on the Fifth Circuit but then on the Mississippi Court of Appeals, in *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1135-42 (Miss. App. 1999) (analyzing in great detail the legislative history of § 85-5-7, ultimately coming to the same conclusion as *Whitehead*).

⁴⁹ *Krieser v. Hobbs*, 166 F.3d 736, 745-47 (5th Cir. 1999).

⁵⁰ *Id.* at 746.

cause,”⁵¹ as well as “the district court’s good, admirable, and equitable intentions,”⁵² he concluded that “[t]he statute is clear; postjudgment interest can run only from entry of judgment.”⁵³

Peavy held in 2000 that 18 U.S.C. § 2520 did not allow for a private right of action against those who procure others to perform illegal wiretapping, because the relevant statutory language had been deleted from the civil-liability section, even though such procuring continued to violate criminal law under 18 U.S.C. § 2511(1)(a).⁵⁴ There seemed to be no particular reason for eliminating such civil liability while retaining criminal liability, or indication in the legislative history that Congress wanted such a result, but the “plain, unambiguous language” was conclusive; “we must assume Congress meant what it said in the amendment.”⁵⁵

Lovick in 2004 held that under the Texas usury law, a brokerage fee does not count as disguised interest where the statute explicitly allows such a fee. The Judge conceded that “[t]o say the least, a \$1500 fee for a \$2000 loan is more than questionable”⁵⁶ and “we are more than well aware that a \$1500 fee for a \$2000 loan appears quite excessive”⁵⁷ but concluded with evident reluctance that “we are compelled to follow the law. . . .”⁵⁸

Martinez held in 2008 that “lawful entry [as a permanent resident] . . . after inspection and authorization” in 8 U.S.C. § 1101(a)(13)(A), relevant to whether an alien was entitled to seek a waiver of inadmissibility, does not encompass an alien who initially enters the United States as a visitor, but then has his status adjusted to be a lawful permanent resident. Despite the Government’s argument that there was no good reason for Congress to deny the opportunity to seek inadmissibility waivers to those who entered the country as LPRs, but not to those who were later adjusted to such status, the Judge held that “we are

⁵¹ *Id.*

⁵² *Id.* at 747.

⁵³ *Id.*

⁵⁴ *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 168-69 (5th Cir. 2000).

⁵⁵ *Id.* at 169.

⁵⁶ *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 438 (5th Cir. 2004).

⁵⁷ *Id.* at 443.

⁵⁸ *Id.*

not at liberty to override the plain, unambiguous text” of the statute.⁵⁹

B. Keeping Interpretation Simple

Several cases display the Judge’s preference for the discussion of interpretive issues to begin and end with a clear statutory text, rather than opening the door unnecessarily to legislative history or other more complicated inquiries.

Judge Barksdale’s 1991 *Moody* opinion refuses to limit the reach of the bankruptcy-fraud provision in 18 U.S.C. § 152 ¶ 7 (“Whoever . . . in contemplation of a case under title 11 . . . or with intent to defeat the provisions of title 11, knowingly and fraudulently conceals any of his property or the property of such other person or corporation” shall be imprisoned and/or fined) to apply only to pre-petition misbehavior,⁶⁰ dismissing the argument by very briefly stressing the word “or”: “[T]he phrase ‘with intent to defeat the provisions of title 11’ is in the disjunctive to the phrase ‘in contemplation of a case under title 11.’ And . . . the paragraph does not use the term ‘property of the debtor.’ Accordingly, there is no need to dissect the Bankruptcy Code. We will not give the plain wording and meaning of ¶ 7 the strained, hypertechnical reading urged by *Moody*.”⁶¹

Bank of Scotland held in 2000 that because the penalty-wages lien in 46 U.S.C. § 10313(g) of the Ship Mortgage Act applies only to the “master or owner” of a vessel, it would not apply to the proceeds of the sale of a vessel where, because of a preferred mortgage lien against the vessel, the owner has no interest in those proceeds; while the Judge conducted an extensive review of the history of admiralty’s treatment of penalty-wages liens, ultimately the plain “master or owner” language controlled.⁶²

⁵⁹ *Martinez v. Mukasey*, 519 F.3d 532, 545 (5th Cir. 2008).

⁶⁰ *United States v. Moody*, 923 F.2d 341, 345-48 (5th Cir. 1991).

⁶¹ *Id.* at 347.

⁶² *Governor & Co. of Bank of Scot. v. Sabay*, 211 F.3d 261, 276 (5th Cir. 2000). The Judge avoided making a joke about an “underwater” ship. Cf. Rhesa Hawkins Barksdale, *Tribute to John Minor Wisdom*, 20 MISS. C. L. REV. 235, 236 (2000) (“An admiralty case does not call for a reference to the court’s ‘steering its way through the

Chenowith in 2006 held that 18 U.S.C. § 921(a)(20)'s permission for gun ownership by those whose civil rights have been restored and whose certificate restoring civil rights did not indicate that he could not possess a gun governed, despite cases from the Fourth, Sixth, and Tenth Circuits following contrary legislative history and would look to state law more broadly, rather than merely the certificate restoring civil rights.⁶³ The Judge quoted an earlier case: "A resort to legislative history is uncalled for . . . because [§ 921(a)(20)'s] instructions are clear."⁶⁴

Franks Investment held in 2008 that 49 U.S.C. § 10501(b)'s broad statement that "[t]he jurisdiction of the [Surface Transportation] Board over . . . transportation by rail carriers . . . is exclusive" and that "the remedies provided in this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law" preempted a state-law action seeking to prevent the removal of railway crossings, disagreeing with courts that have followed legislative history rather than the text of the statute: "[W]e need not stray from the ICCTA's plain statutory language to its legislative history."⁶⁵

Gutierrez-Avascal held in 2008 that a drug conspiracy under 21 U.S.C. § 846 is subject to a restitution order, because the statute provides that conspirators are subject to the same penalties as those for the underlying offense.⁶⁶ The Judge dismissed the defendant's "tools of statutory interpretation and legislative history" because "[t]he language of § 846 is clear," and "[w]e need not look beyond this plain language."⁶⁷

C. Close Attention to Small Details in Language

A number of Judge Barksdale's opinions turn on a careful analysis of exact statutory language, to the point of concern

muddy waters.") (quoting "Wisdom's Idiosyncrasies," a copy of which Judge Barksdale gives to his clerks when they arrive).

⁶³ *United States v. Chenowith*, 459 F.3d 635, 638-40 (5th Cir. 2006).

⁶⁴ *Id.* at 640 (quoting *United States v. Bost*, 87 F.3d 1333, 1336 (D.C. Cir. 1996)).

⁶⁵ *Franks Inv. Co. v. Union Pac. R.R.*, 534 F.3d 443, 449 (5th Cir. 2008), *reh'g en banc granted*, 562 F.3d 710 (5th Cir. 2009).

⁶⁶ *United States v. Gutierrez-Avascal*, 542 F.3d 495, 497-98 (5th Cir. 2008).

⁶⁷ *Id.* at 498.

with particular prepositions or articles. *B-727 Aircraft* in 2001 construed the federal-question authority in 28 U.S.C. § 1351 (“civil actions and proceedings *against* . . . members of a [diplomatic] mission”) not to apply to suits brought *by* members of Jordan’s ambassador.⁶⁸ *Naranjo* in 2001 construed 18 U.S.C. § 3583(i) (allowing district courts to “revoke a term of supervised release for violation of a condition of supervised release . . . if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation”) to authorize post-term revocation of supervised release where a warrant was issued for a different violation than that supporting revocation, reasoning that while “such violation” would have referred to the same violation justifying revocation, the “such *a* violation” language in the warrant-or-summons requirement did not.⁶⁹ *Withrow* held in 2002, disagreeing with the Seventh and Eleventh Circuits, that post-judgment consent to a magistrate-judge referral is too late under 28 U.S.C. § 636(c)(1), because it holds that a magistrate may conduct proceedings “upon”—that is, after—the consent of the parties.⁷⁰ *Alliance Health Group* in 2008 held that a forum-selection clause requiring that litigation “shall occur *in* Harrison County, Mississippi” allowed litigation in a federal district court *in* the county, even though it was not a court *of* the county.⁷¹ “We reject [the party’s] attempt to render ‘in’ and ‘of’ synonymous.”⁷²

Small bits of language alone, however, are not the Judge’s exclusive focus, to the complete neglect of their functional role. Judge Barksdale’s 1991 *Wake* opinion read 21 U.S.C. § 845a(a)’s prohibition of “possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of [a school]” to cover a defendant who possesses drugs within the school zone, but might intend to distribute them

⁶⁸ *In re B-727 Aircraft* Serial No. 21010, 272 F.3d 264, 273-75 (5th Cir. 2001).

⁶⁹ *United States v. Naranjo*, 259 F.3d 379, 382-83 (5th Cir. 2000). *Cf. id.* at 384 (Garwood, J., dissenting) (disagreeing with “the majority’s virtually total reliance on the article ‘a’”).

⁷⁰ *Withrow v. Roell*, 288 F.3d 199, 203 (5th Cir. 2002).

⁷¹ *Alliance Health Group v. Bridging Health Options*, 553 F.3d 397, 399-402 (5th Cir. 2008).

⁷² *Id.* at 400.

elsewhere.⁷³ He noted that earlier cases had endorsed a presumption of intent to distribute merely from the possession of more drugs than could be consumed personally.⁷⁴ Accordingly, because the possession-with-intent-to-distribute crime was not tied to particular distribution plans, the school-zone version of the crime forbade possession of “a felony quantity of a controlled substance—that is, an amount that evidences an intent to distribute the drugs somewhere” within the school zone.⁷⁵ *Wake* illustrates that the Judge’s textualism is not tied exclusively to grammar—here, whether the adverbial restriction “within one thousand feet of a school” would apply to the verb “distribute” as well as the verb “possessing.” Rather, as the Judge points out, quoting the Supreme Court, “[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”⁷⁶ The statutory language is the focus, but the language is construed in light of its functional context.

D. A Presumption for Ordinary Language

The Judge’s opinions have several times resisted the over-extension of technical legal definitions from one context to another. Absent an indication that a technical definition should apply beyond a particular context in which it appears, the Judge uses the ordinary meaning of terms elsewhere. *Solis-Camposano* held in 2002 that “alien smuggling” in Sentencing Guideline 2L1.2(b)(1)(A)(viii) includes transporting aliens within the United States, not merely taking them across the border. The plain language of “smuggling” controlled, notwithstanding other guidelines that seemed to distinguish “smuggling” from “transportation” and contrary statutory definitions of “smuggling” elsewhere: “No authority need be cited for the rule that such plain meaning controls, unless it leads to an ab-

⁷³ *United States v. Wake*, 948 F.2d 1422, 1429-34 (5th Cir. 1991).

⁷⁴ *Id.* at 1430.

⁷⁵ *Id.* at 1431.

⁷⁶ *Id.* at 1430 (quoting *Crandon v. United States*, 494 U.S. 152 (1990)).

surd result.”⁷⁷ *Crittenden* in 2004 construed “counterfeit substance” in Sentencing Guideline 4B1.2 to include simulated

⁷⁷ *United States v. Solis-Campanzano*, 312 F.3d 164, 166 (5th Cir. 2002). “No authority need be cited” is a well-worn Barksdalism. The Judge has been known, in fact, to replace actual citations of authority in drafts with such explanations. For other refusals to cite authority for too-basic propositions, see *Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 617 (5th Cir. 2007) (“No authority need be cited for our clear-error standard of review for findings of fact.”); *Financial Acquisition Partners v. Blackwell*, 440 F.3d 278, 284 (5th Cir. 2006) (“No authority need be cited for the rule that a reviewing court will consider an issue properly presented to a district court, even though not addressed by it.”); *Arsement v. Spinnaker Exploration Co.*, 400 F.3d 238, 247 (5th Cir. 2005) (“No authority need be cited for the rule that, generally, we do not consider an issue first raised at oral argument on appeal.”); *Guidry v. Dretke*, 397 F.3d 306, 319 (5th Cir. 2005) (“[N]o authority need be cited for the rule that we, not the parties, select the appropriate standard of review, including whether an issue will even be addressed if not raised in district court.”); *id.* at 320 (“[N]o authority need be cited for the well-established rule that, after conditional habeas relief was granted, the State was *not* required to move the district court to reconsider its having ordered the hearing in order for the State to preserve this narrow issue for review.”); *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 345 (5th Cir. 2004) (“No authority need be cited for the rule that, generally, we do *not* review an issue not presented in district court.”); *Brazoria County v. EEOC.*, 391 F.3d 685, 688 (5th Cir. 2004) (“No authority need be cited for the fact that jurisdiction is *always* at issue; without it, a court is powerless to act.”); *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003) (“No authority need be cited for the rule that courts should avoid constitutional decisions as much as possible.”); *GDF Realty Invs. v. Norton*, 326 F.3d 622, 627 (5th Cir. 2003) (“No authority need be cited for the fundamental and well-known limitation on the power of our Federal Government: the Constitution grants it limited and enumerated powers; those powers not so granted the Federal Government are retained by the States.”); *United States v. Cyprian*, 197 F.3d 736, 741 (5th Cir. 1999) (“No authority need be cited for the rule that points on appeal are abandoned if *not* briefed adequately.”); *United States v. Muhammad*, 165 F.3d 327, 330 (5th Cir. 1999) (“No authority need be cited for the long-established rules that personal, but *not* subject matter, jurisdiction can be waived; that we examine subject matter jurisdiction throughout a proceeding, concomitantly raising the issue *sua sponte* if need be; and that we freely review jurisdictional questions.”); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). (“No authority need be cited for the necessary and longstanding rule that, absent a change in the law, a decision by our court is binding on subsequent panels.”); *United States v. Condren*, 18 F.3d 1190, 1198-99 (5th Cir. 1994) (“No authority need be cited for the fact that theft is a close and ever present partner of illegal drugs, either to steal the drugs, or to steal money or other items to purchase them.”); *Lloyd v. John Deere Co.*, 922 F.2d 1192, 1194 (5th Cir. 1991) (“No authority need be cited for the rule that for this diversity action, Mississippi’s substantive law is applied.”).

On the subject of Judge Barksdale’s style, I would be remiss to fail to note a few of the Judge’s idiosyncrasies in punctuation. On the very first day of our clerkship, the Judge commended to us WILLIAM STRUNK & E.B. WHITE, *THE ELEMENTS OF STYLE* (3rd ed. 1979), as well as Judge Wisdom’s similar paean to brevity, *see Barksdale, supra* note 62, at 236 (“One word instead of two; two instead of three, five—so on.”). However, I soon found out that the Judge dissented from their very first rule—put an “s” after the apostrophe even for possessives ending in “s,” such as “Charles’s.” *See Fields v. Johnson*, 159 F.3d 914, 914 (5th Cir. 1998) (“Fields’ motion for appointment of counsel on appeal is DENIED.”). (Strunk and White make an exception for “Moses” and “Jesus.” *See*

drugs, holding that the ordinary meaning of the word "counterfeit" controlled, rather than the much more limited trademark-style meaning the phrase receives in 21 U.S.C. § 802(7).⁷⁸

However, despite the Judge's resistance to the use of technical definitions outside their proper context, he has given due regard to Congress's authority to use words as it sees fit, even if ordinary people use words differently. *Steve Jackson Games* in 1994 construed "intercept" in the Wiretap Act, noting that the definition of "electronic communication" did not include storage, though the definition of "wire communication" (a term used regarding the transmission of "aural transfer") did include such storage.⁷⁹ Accordingly, the retrieval by the Secret Service of electronic bulletin-board messages that had not yet been read by recipients did not count as "intercepts." *West Texas Marketing* in 1995 held that the bankruptcy estate did not count as a "successor to the debtor" under the rule of 11 U.S.C. § 505(b) discharging tax liability where the IRS does not act in a timely way, because such a "successor" must be an individual, partnership, or corporation, but the bankruptcy estate is instead comprised of a collection of interests.⁸⁰ The Judge also relied on the

STRUNK & WHITE, *supra*, at 1.) See, e.g., *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, 461 (5th Cir. 1994) ("Congress' intent"). The Supreme Court has divided over the issue. Compare *Kansas v. Marsh*, 548 U.S. 163, 167 (2006) (Justice Thomas's majority opinion) ("Kansas' capital sentencing statute"), with *id.* at 182 (Scalia, J., concurring) ("Kansas's death penalty statute"); *id.* at 203 (Souter, J., dissenting) ("Kansas's capital sentencing statute"). The Judge also habitually puts quotation marks inside periods if he is not quoting an entire sentence, as if he were British, see, e.g., *Jones v. Jones*, 163 F.3d 285, 289 (5th Cir. 1998) (reference to jurors "unwilling to impose the consequences of a guilty as charged verdict."); FREDERICK C. CREWS, *THE RANDOM HOUSE HANDBOOK* 300 (1980) ("Commas and periods should be placed inside the closing quotation marks in all circumstances."); MERRIAM-WEBSTER'S *MANUAL FOR WRITERS & EDITORS* 31-32 (1998) ("In British usage, commas and periods following quoted material go inside only those quotation marks that enclose material that originally included the period or comma."). A full treatment of Judge Barksdale's punctuation is, alas, beyond my scope here, but would surely discuss his perhaps-excessive love of hyphenated legal expressions, commas, italics, and parentheses.

⁷⁸ *United States v. Crittenden*, 372 F.3d 706, 708-09 (5th Cir. 2004).

⁷⁹ *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, 461-62 (5th Cir. 1994).

⁸⁰ *In re W. Tex. Marketing Corp.*, 54 F.3d 1194, 1200 (5th Cir. 1995).

distinction of the estate from "successor to the debtor" in another statutory section.⁸¹

E. Textualism in Contract Interpretation

Judge Barksdale's textualism also appears in his contracts opinions. His 1992 opinion in *Seal* considered the relationship between a 1976 Trust Agreement and a 1979 Employment Contract, refusing to use provisions for "non-actual termination" in the 1979 agreement to construe royalty provisions in the 1976 contract that hinged on termination.⁸² His 1993 *Illinois Central* opinion construed contractual language barring "omissions that will . . . create an obstruction of the sight zone" to create an obligation to clear and maintain sight zones: "Although the provision may be poorly worded, this does not constitute ambiguity or render the provision unclear."⁸³ Absent ambiguity or absurdity, no extrinsic evidence was relevant.⁸⁴ *Williamson* in 1998 considered whether money received under a "take-or-pay" settlement that required payments even for natural gas that was not received fell under a lessee's obligation to make royalty payments

⁸¹ *Id.* (citing 11 U.S.C. § 505(c)). For other instances of Judge Barksdale's textualism, see *United States v. Condren*, 18 F.3d 1190, 1195-98 (5th Cir. 1994) (Sentencing Guideline § 2K2.1(b)(5)'s sentencing enhancement for firearm possession "in connection with" drug possession satisfied by simultaneous possession of a gun and drugs in close proximity, because the issue was controlled by the "ordinary and natural meaning" of the term "connection."); *Sta-Home Home Health Agency v. Shalala*, 34 F.3d 305, 309 (5th Cir. 1994) (portions of salary donated back to their employer were not "actually incurred" under the Medicaid reimbursement rule in 42 U.S.C. § 1395o, given that the money designated as donations "never left [the employer's] account and was never paid to those employees."); *United States v. Meeks*, 69 F.3d 742, 744-45 (5th Cir. 1995) (18 U.S.C. § 656's ban on theft by anyone "connected in any capacity with" a federally-insured bank encompassed theft by an employee of the locksmith company working for the bank, because the ordinary meaning of such language does not require any sort of relationship of trust); *United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003) ("trigger" in 26 U.S.C. § 5845(b)'s definition of a machine gun includes a switch that turns on a motor that in turn presses the gun's original trigger); *United States v. Brown*, 470 F.3d 1091, 1096 (5th Cir. 2006) (Sentencing Guideline 3C1.1 (obstruction of justice "during the course of the investigation, prosecution, or sentencing of the instant offense") did not apply to a defendant who had been a fugitive for an unrelated crime and only charged with the instant, felon-in-possession offense after he was in custody; "a plain reading of § 3C1.1" required such a result).

⁸² *Seal v. Knorpp*, 957 F.2d 1230, 1235-37 (5th Cir. 1992).

⁸³ *Ill. Cent. R.R. v. R.R. Land, Inc.*, 988 F.2d 1397, 1407-08 (5th Cir. 1993).

⁸⁴ *Id.* at 1408 (quoting LA. CIV. CODE ANN. art. 2046).

for “gas produced from said land . . . when sold by lessee,” holding that such language does not apply unless gas is actually produced and delivered.⁸⁵ “Equitable considerations do not come into play,” the Judge said, where “an issue is expressly covered by language in a lease.”⁸⁶ Highlighting the impartiality of textualism, the Judge pointed out that adhering to contractual text cuts both ways: “In [an earlier case,] this court held that, under Mississippi law, the provisions in the lease controlled, even though, in that case, the gas producer was economically disadvantaged. This time, it appears that it is the royalty owners who are adversely affected by the enforcement of the lease.”⁸⁷ *Valdez-Sanchez* held in 2005 that revocations of supervised release and probation do not count as “additional charges” per a plea agreement, because the underlying charges for those crimes were pre-existing.⁸⁸ *Foulston-Siefkin LLP* held in 2006 that a provision in a trust agreement “reimbursement” for costs “incurred” did not apply to a lawyer’s costs that he had not been required to pay himself, but were instead paid by his law firm: “Because [the lawyer] is not out any money, and never will be, there is nothing ‘to pay [him] back or compensate [him] for’, even if he did *incur* expenses at some point.”⁸⁹ *Bulko* held in 2006 that an inactive member of a bar could count as an “attorney” under the “plain language” of an arbitration agreement, particularly given the NASD’s discretion to manage its arbitrators.⁹⁰

F. The Limits of Textualism: Absurd Results

The Judge’s textualism is not, of course, unyielding. He most prominently relied on the absurd-results doctrine in his 2002 and 2004 panel and en banc dissents in *Kinney*, arguing that even if the literal terms of 42 U.S.C. § 1985 forbid a state from making employment decisions based on its employees’ or

⁸⁵ *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 550-52 (5th Cir. 1998).

⁸⁶ *Id.* at 552.

⁸⁷ *Id.*

⁸⁸ *United States v. Valdez-Sanchez*, 414 F.3d 539, 541-42 (5th Cir. 2005).

⁸⁹ *Foulston-Siefkin LLP v. Wells Fargo Bank of Tex.*, 465 F.3d 211, 215 (5th Cir. 2006).

⁹⁰ *Bulko v. Morgan Stanley DW Inc.*, 450 F.3d 622, 626 (5th Cir. 2006).

prospective employees' expert testimony, such a result would be absurd.⁹¹ In one way, Judge Barksdale's reliance on the absurdity canon in his *Kinney* dissents display a similar sort of refusal to misconstrue clear statutory text as his more straightforwardly textualist opinions: rather than say that the text really means something different from what it seems to, he admits forthrightly that he reaches his conclusion based only on the absurdity of the result.⁹²

III. CONSTITUTIONAL LAW

In general, Judge Barksdale has not frequently used constitutional law to assert judicial supremacy over elected legislatures or executive officials. Judge Barksdale's description of Justice Byron White also describes himself: "His opinions reflect his unwavering confidence and faith in our majoritarian, democratic system. He understands the limited role of the courts, especially the federal courts, in that system, feeling confident that the affairs of our nation are best managed by its people and their elected representatives."⁹³

⁹¹ *Kinney v. Weaver*, 301 F.3d 253, 291 (5th Cir. 2002) (Barksdale, J., dissenting) ("[E]ven where a statute's meaning is plain, 'we may depart from its meaning . . . to avoid a result so bizarre that Congress could not have intended it'. This is just such an instance.") (quoting *Moosa v. INS*, 171 F.3d 994, 1008 (5th Cir. 1999) (Barksdale, J., majority opinion)); *Kinney v. Weaver*, 367 F.3d 337, 377 (5th Cir. 2004) (en banc) (Barksdale, J., dissenting) (same). The Judge began his *Kinney* en banc dissent by quoting Thomas Hobbes: "The privilege of absurdity; to which no living creature is subject but man only." *Kinney*, 367 F.3d at 374-75 (Barksdale, J., dissenting) (quoting THOMAS HOBBES, *Leviathan* pt I, ch. 5 (1651)).

⁹² The Judge's brief special concurrence in *Piggly Wiggly Carksville, Inc. v. Mrs. Baird's Bakeries*, 177 F.3d 380 (5th Cir. 1999), exhibits a similar desire not to distort plain text, even when he might come to the same result by different means. The issue there was whether the trial court properly declined to impose sanctions for the violation of the terms of a settlement and resultant court order. *Id.* at 382. The Judge contended, contrary to the majority, that the "plain wording" of the settlement had been violated, and would rest instead on the district court's discretion to acknowledge that "reasonable persons can differ on this point." *Id.* at 384 (Barksdale, J., specially concurring).

⁹³ Rhesa H. Barksdale, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3, 6 (1993).

A. The Establishment Clause

Judge Barksdale has written only three opinions on the Establishment Clause, but all three have covered controversial—and energetically-controverted—issues: governmental use of religious symbols, the treatment of evolution in the public-school curriculum, and permissible bounds on legislative prayer. *Murray*, from 1991, allowed the City of Austin to retain its city seal despite the inclusion of a relatively-small cross derived from Stephen F. Austin's family crest.⁹⁴ Judge Barksdale's 2000 dissent-from-denial-of-rehearing-en-banc in *Freiler* disagreed with the panel's invalidation of a school board's adoption of a disclaimer to precede the teaching of evolution.⁹⁵ Judge Barksdale's 2006 panel opinion in *Doe v. Tangipahoa Parish*, in which he wrote for himself alone with dissents on both sides, would have set limits on sectarian or proselytizing legislative prayer, but without considering other sorts of prayer.⁹⁶

All three of these opinions represent the struggle to apply a neutrality norm that bars government from promoting or inhibiting religion (either in purpose or primary effect).⁹⁷ A key issue in all three opinions is the baseline with respect to which such promotion or inhibition is to be measured.⁹⁸ Without a clear baseline, a neutrality norm is meaningless; proponents of an Establishment Clause claim can always find some level of hos-

⁹⁴ *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991).

⁹⁵ *Freiler v. Tangipahoa Parish Bd. of Educ.*, 201 F.3d 602 (5th Cir. 2000) (Barksdale, J., dissenting from the denial of rehearing en banc).

⁹⁶ *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006). As Professor Lund describes, the en banc court later found insufficient evidence of standing, over Judge Barksdale's energetic dissent. See Andrew C.W. Lund, *The Importance of Lawyers in Judge Barksdale's Writings*, 79 MISS. L.J. 301, 312-14 & nn. 45-52 (2010).

⁹⁷ See *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963).

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Id.*

⁹⁸ See Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 6 (1989) ("To determine whether religion has been 'aided' or 'penalized' (terms the Court has used synonymously with 'advanced' and 'inhibited') one needs a baseline: 'aid' or 'penalty' as compared to what?").

tility to religion relative to which its actual policies promote religion, while critics can always find a level of encouragement for religion relative to which its actual policies are actually hostile to religion. The Judge noted in *Murray* that “requiring the City to remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion.”⁹⁹ One way to put the point would be that we should take as a baseline a background culture allowing the noncoercive display of religious symbols, as well as other symbols, in public. Against such a baseline, allowing a city named in honor of Stephen F. Austin to display the Austin family crest, even if that crest includes a cross, can be considered merely as a neutral acknowledgment of the religious tradition of the Austin family, while requiring its removal would be impermissibly hostile to such traditions.

In *Freiler*, the Judge would have allowed a local school board to append a disclaimer to the teaching of evolution in the curriculum stating that “the Scientific Theory of Evolution . . . should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.”¹⁰⁰ Against a baseline including a disclaimerless evolution lesson, of course, the addition of the disclaimer might seem to favor religious views of human origins. Against a baseline *not* including the teaching of evolution, however, it would not impermissibly favor religion relative to such a baseline to (a) teach in the school curriculum a non-religious view of man’s origin that historically has competed with religious views on the topic, and then (b) mention the existence of other religious views in the brief disclaimer.¹⁰¹ As the Judge put

⁹⁹ *Murray*, 947 F.2d at 158.

¹⁰⁰ *Freiler*, 201 F.3d at 604.

¹⁰¹ Indeed, it might seem that because the evolutionary account is actually *included in the curriculum*, while the biblical view is merely *mentioned*, such an approach would in fact still be hostile to a biblical view of origins. Justice Scalia suggested such a point in his dissent from the denial of certiorari:

[T]he theory of evolution is the only theory actually *taught* in the Tangipahoa Parish schools. As the introductory paragraph of the resolution suggests, the disclaimer operates merely as a (perhaps not too believable) ‘disclaimer from endorsement’ of that single theory, and not as an affirmative endorsement of any particular religious theory as to the origin of life, or even of religious theories as to the origin of life generally. *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting).

it, he said that "in seeking to enforce constitutionally mandated neutrality, the panel has strayed, no doubt unintentionally, into intolerance."¹⁰² As the Judge put the point,

The theory of evolution may be viewed by some as anti-religious. The disclaimer recognizes this historic tension between evolution (scientific concept) and other theories or concepts about the origin of life and matter, using the "Biblical version of Creation" as but an *example* of such other concepts. . . . The disclaimer balances; it neutralizes; it is consistent with the requisite neutrality. . . .

. . . .

The curriculum provides students with information about *only one concept* (evolution). The disclaimer's mere mention of the existence of other concepts, *without presenting any information about the content of those concepts*, neither gives any preferred status to, nor advances, any other concept, which students must make an additional effort to consider or learn, *outside the classroom*.¹⁰³

Finally, in *Doe*, the Judge again encountered an Establishment Clause challenge involving the Tangipahoa Parish School Board. This time, however, the issue was their public meetings, and this time, the Judge ruled against them. The Judge noted his own earlier characterization in *Murray* of the legislative prayers approved by the Supreme Court: they "showed 'absolutely no evidence of an intent to proselytize, or advance, any religion, and no threat of an establishment of religion.'"¹⁰⁴ The Tangipahoa Parish School Board's pattern of legislative prayers, however, "at minimum aggressively advocated" Christianity.¹⁰⁵ At the same time, the Judge noted that the district court's injunction against *any* prayer at school board meetings went beyond what was necessary to decide the case, and threatened the

¹⁰² *Freiler*, 201 F.3d at 603.

¹⁰³ *Id.* at 606.

¹⁰⁴ *Doe*, 473 F.3d at 197 (quoting *Murray*, 947 F.2d at 155, characterizing the prayers in *Marsh v. Chambers*, 463 U.S. 783 (1983)).

¹⁰⁵ *Id.* at 204 (quoting *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998)).

"tolerable acknowledgment of beliefs widely held among people of this country."¹⁰⁶ Again, the task of enforcing the Establishment Clause involves distinguishing the sort of acknowledgment that would simply reflect the background religious traditions of American culture from the sort of promotion of particular views that would depart from such a baseline.

B. Freedom of Speech and Association

Judge Barksdale's constitutional opinion with the most rhetorical flourishes is probably *Louisiana Debating and Literary Association* from 1995, upholding the confidentiality of New Orleans social clubs' membership lists on freedom-of-association grounds.¹⁰⁷ He referred to

this classic confrontation of competing governmental interests and individual rights; interests and rights that bring into play "our Federalism" on the one hand, and federal courts' protection of constitutional rights on the other; a balancing of governmental interests and individual rights that reflects the majesty and scope of our living Constitution.¹⁰⁸

The Judge concluded that "the City has failed to meet its burden of demonstrating how the means it has selected to enforce the Chapter are the least intrusive on the Clubs' and their members' right of private association."¹⁰⁹ The Judge ended his opinion,

Discrimination can find no rest in a place of public accommodation. Whether it should be suffered to abide in private clubs

¹⁰⁶ *Id.* at 198 (quoting *Marsh*, 463 U.S. at 792). Judge Stewart's panel dissent would have found that the legislative prayers at issue in *Marsh* were not sufficiently analogous to the school-board prayers in *Doe*, see *id.* at 209 (school board prayers are "a new set of factual circumstances that are completely distinct from the legislative arena"), while Judge Clement would have found *Marsh* to allow prayers as long as they did not improperly "exploit" the platform to advance religion, which, as she read the record, had not been shown, *id.* at 215 ("the Board has affirmatively stated, through the stipulated and offered testimony, its willingness to allow any viewpoint to be heard at the meetings").

¹⁰⁷ *La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995).

¹⁰⁸ *Id.* at 1488.

¹⁰⁹ *Id.* at 1500.

is debatable among persons of good will. But, the Constitution trumps; those clubs have a right of private association under the First Amendment with which the government may not interfere impermissibly. Concomitantly, if those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed; "the flame is not worth the candle". . . . [W]hen persons seek to vindicate constitutional rights in federal court, they will be heard, absent more compelling reasons under that same Constitution for the court to stay its hand.¹¹⁰

Three of Judge Barksdale's freedom-of-speech opinions deal with public employees (all lead plaintiffs beginning with "K"): *Knowlton* in 1992,¹¹¹ his en banc opinion in *Kinsey* in 1992,¹¹² and his panel dissent in *Kinney* in 2002.¹¹³ The Judge's opinions in these cases avoided turning private disputes into First Amendment controversies¹¹⁴ and recognized the importance of flexibility on the part of governments in dealing with disruptive employee speech.¹¹⁵

Three times Judge Barksdale has considered the free-speech rights of sexually-oriented businesses: *LLEH* in 2002,¹¹⁶ *Baby Dolls* in 2002,¹¹⁷ and his *Reliable Consultants* dissent in 2008.¹¹⁸ While the Judge generally was sympathetic with the

¹¹⁰ *Id.*

¹¹¹ *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172 (5th Cir. 1992).

¹¹² *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988 (5th Cir. 1992) (en banc) (plurality opinion).

¹¹³ *Kinney v. Weaver*, 301 F.3d 253, 291 (5th Cir. 2002) (Barksdale, J., dissenting).

¹¹⁴ *Knowlton*, 957 F.2d at 1178 (cafeteria workers complaints about being compelled to "volunteer" at evening school board meetings reflect "private, not public, concerns," though their FLSA judgment was affirmed).

¹¹⁵ *Kinsey*, 950 F.2d at 996 (school board allowed to dismiss school superintendent who had opposed the election of the majority slate on the school board, because the board was "dependent upon [the superintendent], its chief administrator, to implement its policies and decisions" and the superintendent had "power to 'make or break' Board policies"); *Kinney*, 301 F.3d at 294 (police instructors' expert testimony against police officers "impeded their performance in the classroom by undermining the enrolling entities' trust in Plaintiffs as teachers and interfered with the regular operation of the [police academy]," the government's "interests in effective training of their law enforcement personnel (necessary for the efficient provision of public services) far outweigh Plaintiffs' interests in providing expert testimony").

¹¹⁶ *LLEH, Inc. v. Wichita County.*, 289 F.3d 358 (5th Cir. 2002).

¹¹⁷ *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002).

¹¹⁸ *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (Barksdale, J., dissenting).

desire of communities to deal with the secondary effects of sexually-oriented businesses,¹¹⁹ he did agree with the court in *Reliable Consultants* that the sex-toy-store's commercial-speech claim could go forward, though its litigation posture might have been premature.¹²⁰

Two of the Judge's opinions consider the regulation of speech in special locations, showing in both cases sympathy for the public's need to promote safety: *Houston Chronicle* in 2007, dealing with the distribution of newspapers at street intersections,¹²¹ and his dissent in *Vasquez* in 2001, dealing with the canvassing rules that apply in public housing.¹²²

Several other cases also address free speech. *Peavy* in 2000 dealt with the intersection of the First Amendment with state and federal wiretap acts, rejecting a claim by a newspaper that had participated in some of the wiretapping at issue.¹²³ *Cornish* in 2005 held that a private operator of a juvenile detention facility was not acting under color of state law toward employees claiming their dismissal violated the First Amendment; while providing juvenile correctional services was obviously state ac-

¹¹⁹ *LLEH*, 289 F.3d at 367 (allowing a growing rural community to attempt to "successfully sidestep many of the problems encountered by urban areas"); *Baby Dolls*, 295 F.3d at 481 ("[W]e must determine whether, under this *reasonable belief* standard, the City's evidence demonstrates a *link* between its interest in combating secondary effects and the Ordinance. That standard is satisfied.").

¹²⁰ *Reliable Consultants*, 517 F.3d at 748-49 ("[T]he commercial-speech claim (advertising) may be premature," but concurring in the vacatur of the dismissal of the claim).

¹²¹ *Houston Chronicle v. City of League City*, 488 F.3d 613, 622 (5th Cir. 2007) (facial validity of statute supported because "proscription serves a compelling interest at the heart of the government's function: public safety").

¹²² *Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198, 207 (5th Cir. 2001) (Barksdale, J., dissenting) (under nonpublic forum analysis, regulations on door-to-door canvassing in public housing are "a reasonable response to the problem of rampant crime in low-income housing developments"). *Vasquez* was later taken en banc, see 289 F.3d 350 (5th Cir. 2002), but not decided because of the death of the only plaintiff to take an appeal. A later panel upheld a revised version of the regulations against a challenge brought by the widow of the original plaintiff. See *De la O v. Hous. Auth. of El Paso*, 417 F.3d 495, 499 (5th Cir. 2005) (recounting *Vasquez* history).

¹²³ *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 188, 193 (5th Cir. 2000) (holding that the use and disclosure provisions of the state and federal Wiretap Acts, as applied to media defendants who "received directly from the interceptors, with full knowledge of the circumstances of the interceptions and with some participation concerning the interceptions," would constitutionally "further substantial governmental interests in protecting the confidentiality of private communications").

tion, employing particular personnel to do so was not.¹²⁴ *Moore* in 1995 upheld a thirty day ban on the solicitations of accident victims, holding that under the commercial-speech standard, preservation of victims' privacy was a sufficient interest.¹²⁵

C. Takings

Washington Legal Foundation in 2001 struck down on Fifth Amendment takings grounds Texas's Interest-on-Lawyer's-Trust-Accounts program, which funded legal representation for the poor through the interest on money held in lawyers' custody for clients. The issue divided the Fifth Circuit panel, with a dissent by Judge Weiner, just as it divided the Supreme Court itself. *Washington Legal Foundation* had been at the Supreme Court once, the Court finding 5-4 that the money was the property of the client.¹²⁶ On remand and following a bench trial, Judge Barksdale's opinion took the takings claim the rest of the way, finding a violation.¹²⁷ The Supreme Court, however, later disagreed with Judge Barksdale, again 5-4, this time disfavoring the claim, holding that using interest for other purposes was not an unconstitutional taking where alternative uses for the money would not have produced any benefit to the client.¹²⁸

D. Substantive Due Process

Judge Barksdale has dealt with substantive-due-process claims in four cases. Three of them rebutted complaints against overly-zealous law enforcement: in *Kiser* in 1995, a child-abuse investigation that the plaintiffs claimed continued too long,¹²⁹ in

¹²⁴ *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005).

¹²⁵ *Moore v. Morales*, 63 F.3d 358, 363 (5th Cir. 1995) (applying then-brand-new *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995)).

¹²⁶ *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

¹²⁷ *Wash. Legal Found. v. Tex. Equal Access to Justice*, 270 F.3d 180, 186-89 (5th Cir. 2001).

¹²⁸ *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips v. Wash. Legal Found.*, 538 U.S. 942 (2003) (vacating the Fifth Circuit *Washington Legal Foundation* opinion for reconsideration in light of *Brown*).

¹²⁹ *Kiser v. Garrett*, 67 F.3d 1166, 1173 (5th Cir. 1995) (because, "although a substantive due process right to family integrity has been recognized, the contours of that right are not well-defined, . . . especially in the context of a state's taking temporary

Robertson in 1995, misinformation given to a juvenile about his exposure to adult sentence,¹³⁰ and in *O'Banion* in 1991, money-reporting requirements that apply even if the underlying source of the money is innocent.¹³¹ The Judge's 2008 dissent in *Reliable Consultants* disagreed with the extension of *Lawrence v. Texas* sexual-privacy rights to the commercial distribution of sex toys.¹³² All of these opinions are relatively low-key, lacking some of the *sturm und drang* that such disputes produce at the Supreme Court. The *Reliable Consultants* dissent, for instance, merely indicated that he would follow the Eleventh Circuit on the level of scrutiny established by *Lawrence* and on whether *Lawrence's* constitutional protection for private sexual behavior encompassed public commercial activities as well.¹³³

E. Fourth Amendment

Judge Barksdale has written a great many opinions in Fourth Amendment cases, governing all aspects of its doctrine. As he has put it himself, the Court has addressed the reasonable-suspicion standard for a traffic stop "time . . . and time . . . and time again."¹³⁴ Much the same could be said of the other areas of Fourth Amendment law. Given the fact-dependent nature of the reasonable-suspicion, probable-cause, consent-to-search, and exigent-circumstances determinations, almost every

custody of a child during an investigation of possible parental abuse," qualified immunity was appropriate).

¹³⁰ *Robertson v. Plano*, 70 F.3d 21, 24 (5th Cir. 1995).

We find neither Fourteenth Amendment case law, nor case law construing other constitutional requirements, that would support holding that the Due Process Clause afforded the Robertsons' son (16 years old) a right to be free from an erroneous admonishment regarding punishment and prison. Nor do we find such conduct to be of the type that is violative of substantive due process. *Id.*

¹³¹ *United States v. O'Banion*, 943 F.2d 1422, 1433-34 (5th Cir. 1991) ("[O]ur role is to evaluate only whether Congress acted within the limits of the due process clause, not whether it could have accomplished its goal through other, less intrusive means We cannot say that Congress has acted arbitrarily.").

¹³² *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (Barksdale, J., dissenting).

¹³³ *Id.* at 749 (for both issues, relying very briefly on *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004)).

¹³⁴ *United States v. Morales*, 191 F.3d 602, 605 (5th Cir. 1999) (ellipses in original).

criminal defendant against whom the police have found evidence through a search has an incentive to consider arguing that the search violated the Fourth Amendment. The vast majority of these claims are rejected, and the Judge has certainly contributed his share.

Ervin, the Judge's very first published opinion in 1990, considered the automobile exception to the warrant requirement and found probable cause based (among other factors) on the driver's late arrival and short stay at a suspected smuggling site.¹³⁵ *Lopez* in 1990 found reasonable suspicion for a traffic stop based (again, among other factors) on a truck's load and deceleration as officers approached,¹³⁶ and found consent for a subsequent search voluntary where a suspect said "[s]ure, go ahead" in response to an officer's request.¹³⁷ *Wake* in 1991 found that an affidavit containing some unintentionally-inaccurate information still supported probable cause because its other information was still reliable.¹³⁸ *Eastland* in 1993 rejected a novel claim that the violation of state-law trespass rules should result in the exclusion of evidence from federal court even where a search does not implicate the Fourth Amendment because "open fields" do not fall within the Amendment's protection for "persons, houses, papers, and effects."¹³⁹ *Leatherman* in 1994 found that drug-production-related odors supported probable cause to issue a warrant.¹⁴⁰ In *Blount* in 1996, a dissent by the Judge vindicated en banc the next year, the Judge held that an informant's indication of the direction of a fleeing suspect supported probable cause and lack-of-warrant-excusing exigent circumstances.¹⁴¹ *Robertson* in 1995 found that a juvenile was never under arrest, and so not "seized" under the Fourth Amendment.¹⁴² *Maldonado* in 1995 held that an officer did not (plainly)

¹³⁵ United States v. Ervin, 907 F.2d 1534, 1539-40 (5th Cir. 1990).

¹³⁶ United States v. Lopez, 911 F.2d 1006, 1008-10 (5th Cir. 1990).

¹³⁷ *Id.* at 1010-1011.

¹³⁸ United States v. Wake, 948 F.2d 1422, 1428-29 (5th Cir. 1991).

¹³⁹ United States v. Eastland, 989 F.2d 760, 765-67 (5th Cir. 1993).

¹⁴⁰ *Leatherman v. Tarrant County Narcotics Intelligence*, 28 F.3d 1388, 1393-94 (5th Cir. 1994).

¹⁴¹ United States v. Blount, 98 F.3d 1489, 1501-06 (5th Cir. 1996) (Barksdale, J., dissenting); rev'd, 123 F.3d 831 (5th Cir. 1997) (en banc).

¹⁴² *Robertson v. City of Plano*, 70 F.3d 21, 24 (5th Cir. 1995).

go beyond a permissible protective frisk in reaching for a bulge that might have been a weapon but turned out to be drugs.¹⁴³ *Rodea* in 1996 held that suspects' discovery of drug-enforcement investigators was a lack-of-warrant-excusing exigent circumstance.¹⁴⁴ In his 1996 dissent in *Ho* (which, as noted above, also involved whether a plain-error standard should apply), the Judge would have found probable cause to continue a search of a portfolio from the observation of a blank credit-card-shaped plastic card.¹⁴⁵ The Judge's 1998 dissent in *Miller* would have found probable cause for a traffic stop based on a car's use of a left turn signal as it drove through an intersection.¹⁴⁶ *Morales* in 1999 finds reasonable suspicion for a traffic stop based on a pickup truck's heavy load and fiberglass cover over the truck bed.¹⁴⁷ *Gibbs* in 2005 found officers relied in good faith on a search warrant supported by a drug-dealing-describing affidavit.¹⁴⁸

The Judge has frequently in Fourth Amendment cases resolved them on the narrowest possible grounds. *Kleinebreil* in 1992 found that officers relied in good faith on a warrant supported by an affidavit with "sufficient 'indicia of probable cause'" regarding drug smuggling; the probable-cause issue itself did not need resolution.¹⁴⁹ *Roberts* in 2001 held that it did not need to decide the full extent of the outbound-border-search exception to a reasonable-suspicion requirement, because reasonable suspicion was present.¹⁵⁰

In addition to criminal defendants, a great number of civil plaintiffs have pursued Fourth Amendment claims against police, particularly for excessive force. In *Bazan* in 2001, a case in which a suspect was killed, the Judge found that a plaintiff's

¹⁴³ *United States v. Maldonado*, 42 F.3d 906, 910-13 (5th Cir. 1995). The standard was "plainly" because a plain-error standard applied. *Id.* at 909-10.

¹⁴⁴ *United States v. Rodea*, 102 F.3d 1401, 1407-09 (5th Cir. 1996).

¹⁴⁵ *United States v. Ho*, 94 F.3d 932, 945-47 (5th Cir. 1996) (Barksdale, J., dissenting).

¹⁴⁶ *United States v. Miller*, 146 F.3d 274, 281-82 (5th Cir. 1998) (Barksdale, J., dissenting).

¹⁴⁷ *United States v. Morales*, 191 F.3d 602, 606-07 (5th Cir. 1999).

¹⁴⁸ *United States v. Gibbs*, 421 F.3d 352, 358-59 (5th Cir. 2005).

¹⁴⁹ *United States v. Kleinbreil*, 966 F.2d 945, 949-50 (5th Cir. 1992).

¹⁵⁰ *United States v. Roberts*, 274 F.3d 1007, 1014-16 (5th Cir. 2001).

excessive-force claim survived summary judgment, because the sole surviving witness, the police officer, was an interested witness whom a jury might be entitled to disbelieve.¹⁵¹ In *Jackson* in 1992, the Judge dismissed on failure-to-state-a-claim grounds a claim with merely conclusory allegations about the reasonableness of officers' use of force (though the plaintiffs were given the opportunity to plead additional facts); the fact that a complaint survived a frivolousness inquiry per 28 U.S.C. § 1915(d) did not preclude failure-to-state-a-claim dismissal per Rule 12(b)(6).¹⁵² *Macias* in 1994 rejected as frivolous a completely unexplained claim that a traffic stop was unconstitutional.¹⁵³ In his 1995 dissent in *Dunn*, vindicated en banc the next hear, the Judge held that the Fifth Circuit's "significant injury" excessive-force requirement (itself later overturned by the Supreme Court, but applicable for qualified-immunity purposes) could not be satisfied by nonphysical injury.¹⁵⁴

F. Eighth Amendment

The Judge has considered many Eighth Amendment cruel-and-unusual-punishment claims, generally favoring qualified immunity for prison officials. *Stewart* in 1999, one of the Judge's most cited opinions,¹⁵⁵ rejected a prisoner's claim that prison officials were deliberately indifferent to his medical needs, canvassing the factual history in great detail to show that no particular official knew and deliberately ignored the prisoner's medical condition.¹⁵⁶ *Baldwin* in 1998 rejected an excessive-force claim against officers who used mace pepper spray to quell

¹⁵¹ *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 491-93 (5th Cir. 2001). Per *Johnson v. Jones*, 515 U.S. 304 (1995), the qualified-immunity interlocutory appeal considered only the materiality, not the genuineness, of fact disputes, and so the appeal was dismissed. *Bazan*, 246 F.3d at 493.

¹⁵² *Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 621 (5th Cir. 1992).

¹⁵³ *Macias v. Raul A. (Unknown)*, Badge No. 153, 23 F.3d 94, 98-99 (5th Cir. 1994).

¹⁵⁴ *Dunn v. Denk*, 54 F.3d 248, 253-57 (5th Cir. 1995) (Barksdale, J., dissenting), *rev'd*, 79 F.3d 401 (5th Cir. 1996) (en banc). While the result advocated in the Judge's dissent was vindicated by the en banc court, he disagreed with its approach in part. See *Dunn*, 79 F.3d at 403-04 (Barksdale, J., concurring in part and dissenting in part).

¹⁵⁵ See *Lund*, *supra* note 96, at 302 n.3.

¹⁵⁶ *Stewart v. Murphy*, 174 F.3d 530, 534-38 (5th Cir. 1999); see also *id.* at 538-42 (Politz, J., dissenting).

a disturbance on a bus without giving inmates an immediate opportunity to wash themselves.¹⁵⁷ *Newton* in 1998 rejected a duty-to-protect claim against officers who did not suspect that an inmate's risk of harm from another inmate was substantial.¹⁵⁸ Outside the qualified-immunity context, *O'Banion* in 1991 upheld money-reporting statutes,¹⁵⁹ *Davis* in 1997 held that an incompetent-to-be-executed claim could not satisfy successive-habeas-petition requirements,¹⁶⁰ and *Foster* in 2006 held that a driver for armed robbers displayed enough recklessness toward human life to receive the death penalty.¹⁶¹

G. Commerce Power

Judge Barksdale has contributed one important opinion on the scope of federal power in environmental law, *GDF Realty Investments* in 2005, which found that the impact of different endangered species could be aggregated together in order to assess whether the effect on commerce was sufficient to justify their federal regulation under the Commerce Power.¹⁶² However, even while he favored federal power to enact the Endangered Species Act, the Judge did not adopt as large a view of federal power as was possible in the case. He rejected the district court's rationale that because the ESA would block commerce in particular case—for instance, by blocking a Wal-Mart—the regulation fell under the Commerce Power.¹⁶³ He also rejected the notion that the contribution of particular local-to-Texas species to commerce might support their federal regulation.¹⁶⁴

¹⁵⁷ *Baldwin v. Stalder*, 137 F.3d 836, 838-41 (5th Cir. 1998).

¹⁵⁸ *Newton v. Black*, 133 F.3d 301, 308 (5th Cir. 1998).

¹⁵⁹ *United States v. O'Banion*, 943 F.2d 1422, 1432-33 (5th Cir. 1991).

¹⁶⁰ *In re Davis*, 121 F.3d 952 (5th Cir. 1997).

¹⁶¹ *Foster v. Quarterman*, 466 F.3d 359, 370-72 (5th Cir. 2006).

¹⁶² *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638-41 (5th Cir. 2003).

¹⁶³ *Id.* at 633-36.

¹⁶⁴ *Id.* at 637-38.

CONCLUSION

As Professor Lund has mentioned, judges do not select the cases the court hears or the panels on which they will sit. An individual judge's contribution to the law thus necessarily lacks a certain amount of narrative coherence. Nonetheless, Judge Barksdale's opinions convey the same unmistakable flavor of rigor, diligence, hard work, and devotion to protocol that his clerks have had the chance to observe in person. His personality as a boss and manager fit perfectly, I think, with my own need for restraint in the pursuit of academic tangents and rabbit trails. Like Professor Lund, I found his professionalism and enthusiasm for the work of the law contagious, and I loved both working for him and being part of the Barksdale family. It is impossible for printed words—whether in an opinion or a tribute—to do justice to the Judge's warmth and generosity, or the fondness and affection with which he will always be remembered, but it is a great honor to pay tribute to him.

THE IMPORTANCE OF LAWYERS IN JUDGE BARKSDALE'S WRITINGS

*Andrew C.W. Lund**

INTRODUCTION

It is my honor to contribute a piece to this wonderful collection commemorating Judge Barksdale's extraordinary career on the bench. It was truly a privilege to clerk for the Judge and it is no less so to have the opportunity to write a bit about his impact on the law.

My task is to give readers a sense of Judge Barksdale's jurisprudence since his arrival on the bench in 1990. Summarizing the Judge's written opinions is not easy. Judges on the U.S. Courts of Appeals do not get to choose the cases they are assigned or, in large part, the opinions they must write. Moreover, their opinions are significantly constrained by Supreme Court and circuit court precedent. Summaries of circuit court judges' written opinions tend to be a largely ad hoc collection of interesting decisions that may or may not tie together. Having read each of Judge Barksdale's published opinions, including dissents, a number of broad common strands emerge—respect for the law, judicial modesty, integrity and consistency over time and between contexts, honesty, clarity, and a keen analytical approach. Many of these have been aptly described by Chris Green in these pages.¹

Along this line, I hope in this Article to develop a particular substantive lens through which an otherwise disparate set of his opinions might come into sharper focus. Specifically, I think it is useful to consider the heightened sensitivity to the role of lawyers in Judge Barksdale's jurisprudence. The Judge's writings consistently show that he is particularly invested in the view that attorneys ought to act with civility, integrity and

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¹ See Christopher R. Green, *Some Themes from Judge Rhesa H. Barksdale's Published Opinions*, 79 MISS. L.J. 261 (2009).

competency. These expectations are grounded in the Judge's experience as a judge—his recognition of the “faith, trust and confidence”² that he must place in lawyers if he is to fulfill his duties. Judge Barksdale's writings thus (1) advocate for high professional standards, (2) reflect the central assumption that those standards are being met unless there is significant evidence to the contrary, and, (3) if such contrary evidence is shown, take their violation very seriously. The point is not that other judges do not do this, because surely all judges take lawyers—their role, their behavior, etc.—seriously. Rather, it is that Judge Barksdale's commitment to professionalism, broadly defined, plays an important role in his jurisprudence.

This lens, though hopefully useful, is of course not universally applicable across the Judge's opinions. Writing about any aspect of his opinions necessarily causes one to omit consideration of a number of the Judge's most important decisions that did not turn on the role of the attorneys.³ Nevertheless, this imperfect interpretation is hopefully illuminating in at least one regard. Judge Barksdale's deep respect for the role of lawyers reflects his deep love and respect for the law itself. If law is to retain its “majesty”⁴—if its integrity is to be sustained and its application be honored—those who practice it must behave so as to deserve the majesty, their actions reflecting the same integrity and honor.

The link between lawyers' behavior and the law is clear to Judge Barksdale. To get a sense of its importance to him, one need go no further than “The Role of Civility in Appellate Advocacy,” an article he contributed to a *South Carolina Law Review*

² Rhesa H. Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573, 579 (1999) [hereinafter “The Role of Civility”].

³ Judge Barksdale's opinions have been frequently cited by other courts and in secondary sources. Among his most “popular” opinions in terms of judicial citations are: *Martin v. Cain*, 246 F.3d 471 (5th Cir. 2001); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001); *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086 (5th Cir. 1995); and *Macias v. Raul A. (Unknown) Badge No. 153*, 23 F.3d 94 (5th Cir. 1994). Academics have most often cited: *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Canutillo Ind. Sch. Dist. v. Leija*, 101 F.3d 393, (5th Cir. 1996); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, (5th Cir. 1996); and *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, (5th Cir. 1994).

⁴ See *The Role of Civility*, *supra* note 2, at 580.

symposium on appellate advocacy generally. In it, the Judge makes a compelling case that lawyers who practice civilly—that is, thoughtfully and courteously⁵—are more effective than those who use, for instance, “scorched-earth” tactics.⁶

The Judge’s point is not necessarily obvious given pop culture’s preference for hard-nosed, antagonistic attorneys and the natural assumption that such tactics are necessary to achieve the best outcome for one’s clients. Nevertheless, Judge Barksdale convincingly argues that incivility by appellate advocates (though the point can easily be extended to all forms of advocacy) is truly harmful to their clients’ causes. Such incivility “diminishes respect for the law” and erects a roadblock toward the goal of reaching a “fair, prompt, efficient and relatively inexpensive resolution” to the matter at hand.⁷ As a strategic matter, the incivility harms the client because “[t]he court cannot place faith, trust, or confidence in the [client’s] lawyer.”⁸ More globally, if judges cannot place faith in lawyers, “there can be no appellate advocacy.”⁹ The article thus serves as practical advice for individual lawyers as well as a mission statement of sorts for appellate litigation: the entire project depends on certain standards being met by lawyers.

Judge Barksdale’s article focused on civility, but civility is certainly not the only characteristic of lawyers key to functioning appellate courts. While there are certainly others, this Article raises two more aspects of lawyering that seem to hold a particularly elevated place in the Judge’s jurisprudence: integrity and competency. A presumption of these three (including civility) norms pervades an eclectic subset of Judge Barksdale’s opinions. From the obvious cases (attorney sanctions, ineffective assistance of counsel claims) to the less so (standing, the right against self-incrimination), many of the Judge’s opinions hearken back to the foundational belief that lawyers are important, that their integrity, competency and civility are to be ex-

⁵ Judge Barksdale summed up the concept as “disagree[ing] without being disagreeable.” *Id.* at 577 (citation omitted).

⁶ *Id.* at 574.

⁷ *Id.* at 577.

⁸ *Id.* at 579.

⁹ *Id.*

pected and that incursions on any of those expectations are to be met by a serious response.

Attorney's Fees, Sanctions and Civility

When lawyers fail to act civilly, Judge Barksdale does not stand idly by. Before reviewing some of his opinions on judicial sanctions for attorney misbehavior, it is worth noting that the Judge has expressed his deep concern for civility and professionalism in at least one other context—attorney's fee awards. In *Migis v. Pearle Vision, Inc.*, the Judge concurred in part and dissented in part from a decision that affirmed a \$12,000 award for emotional distress in a Title VII employment discrimination case, remanding the case to the district court on the issue of the \$81,000 fee award for plaintiff's counsel.¹⁰ The Judge concurred with the decision to remand on these fees but stated that he would have gone further and given more guidance to the district court to significantly reduce the award.¹¹

In the case, the plaintiff and her lawyer had entered into a contingency fee arrangement. During the pendency of the litigation, the plaintiff (presumably with advice from counsel) had rejected a settlement offer for an amount only slightly less than the \$12,000 that she would ultimately win months later. From the case's inception through its conclusion, the plaintiff's lawyer had spent a significant number of hours on claims that ultimately failed. Finally, as described above, the lawyer's award was over six times the damages won by the plaintiff.

To the Judge, plaintiff's counsel's behavior reeked of incivility—of unreasonableness.¹² Prefacing his treatment of the issue, he noted:

I fear that this [lodestar] procedure is being applied in keeping with the times, with the idea that nothing deserves something, and, especially in that regard, that lawyers must be handsomely rewarded, notwithstanding that their labors bore little,

¹⁰ 135 F.3d 1041, 1047-49 (5th Cir. 1998) (Barksdale, J., concurring in part and dissenting in part).

¹¹ *Id.* at 1050.

¹² *Id.* at 1049-66 (returning to the concepts of "reason" and "reasonableness" in relation to attorney's fees numerous times).

if any, fruit . . . Reason and reasonableness are missing in action. Excess has become an art form.¹³

In the opinion, he suggested that the district court consider the foregone settlement, the allocation of time spent on successful and unsuccessful claims and the relative paucity of plaintiff's recovery for purposes of arriving at a reasonable attorney's fee award.¹⁴ This went further than the majority, which only remanded based on the disparity between the damages and fee.¹⁵

Judge Barksdale's opinion was not merely a determination that the lawyer in the particular case did not deserve to be rewarded as handsomely as he had been. It also reflected a call for the judiciary to actively raise the level of lawyers' behavior via close inspection of their actions before awarding fees. The system of incentives for attorneys produced inappropriate behavior—in this case the failure to accept a reasonable settlement offer and the waste of resources on unpromising theories. If the law needs lawyers to behave with civility, integrity and honesty, Judge Barksdale believed judges must work to recalibrate the fee incentives to encourage such behavior.¹⁶ Looking solely to the result—the ratio between damages and fees—risked producing a lottery mentality among lawyers and its concomitant diminishment of the characteristics so valued by the Judge. More stringent scrutiny of the process actually undertaken by the lawyer—the settlements rejected and the theories improperly pursued—was necessary to stop the backsliding. While noting the importance of efficient judicial oversight of fee questions, Judge Barksdale concluded that his potentially more time-consuming approach is necessary given the principle at stake.¹⁷

¹³ *Id.* at 1050.

¹⁴ *Id.* at 1056.

¹⁵ *Id.* at 1048.

¹⁶ *See id.* at 1065 ("We bemoan the too often seen lack of civility and professionalism and ethics, as well as the pursuit by some lawyers of, not excellence, but numbing mediocrity . . . Reason and reasonableness can be restored; but, only when we are willing to do so.").

¹⁷ *Id.* at 1056. ("Admittedly, and as noted, a request for attorney's fees should not result in a second major litigation. Nor do we require the district court's . . . analysis to be so excruciatingly explicit that decisions of fee awards consume more paper than did the cases from which they arose.") (internal quotation marks and citation omitted).

The most well-known example of the Judge responding to a lack of civility by a lawyer is his original dissent¹⁸ and subsequent majority en banc opinion¹⁹ in *Whitehead v. Food Max of Mississippi, Inc.* In *Whitehead*, after winning a verdict for his client against Kmart for the latter's failure to provide security in its parking lot, plaintiff's counsel obtained a writ of execution for the \$3.4 million judgment.²⁰ Before executing the writ, the lawyer notified members of the media as to his plans and proceeded to enter the local Kmart and attempt to seize cash from the store's registers and vault. Despite only a three-day lapse between the denial of Kmart's motion for remittitur or a new trial and his entering the Kmart, the lawyer protested to the reporters present about Kmart's arrogance and failure to pay its debt.²¹

Kmart sought sanctions under Rule 11 of the Federal Rules of Civil Procedure. The district court granted the motion based, in part,²² on plaintiff's counsel entering the Kmart in order to embarrass the company and self-promote. Counsel later explicitly confirmed these motives.²³ On appeal, a divided panel held that the lawyer's behavior was "patently inappropriate,"²⁴ but that, absent extraordinary circumstances, no improper purpose should be presumed under Rule 11 when the relevant documents—in this case, the writ—were otherwise legitimately filed.²⁵ Instead, the majority would leave it to other state authorities to handle the matter of counsel's incivility.²⁶

Judge Barksdale dissented from the court's washing its hands of the matter. He noted that the facts at hand repre-

¹⁸ 277 F.3d 791, 797 (5th Cir. 2002) (Barksdale, J., dissenting).

¹⁹ 332 F.3d 796 (5th Cir. 2002) (en banc).

²⁰ That judgment was eventually vacated. See *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265 (5th Cir. 1998).

²¹ 277 F.3d at 797-98.

²² The district court also held counsel had failed to reasonably inquire into the law regarding execution on judgments because an automatic 10-day stay was in effect when he entered the Kmart. The en banc opinion in *Whitehead* ultimately held that counsel had not made a reasonable inquiry, but held that the "improper purpose" ground for sanctions was sufficient in any event. See 332 F.3d at 804-05.

²³ *Id.* at 807.

²⁴ 277 F.3d at 796-97 (Barksdale, J., dissenting).

²⁵ *Id.* at 796.

²⁶ *Id.* at 797.

sented exactly the kind of "exceptional circumstances" the majority would require. When the purpose of obtaining the writ was as obviously improper as it was in the case, Rule 11 sanctions were appropriate. Consistent with the views he had expressed elsewhere, the Judge considered counsel's actions not merely an affront to Kmart, but also an attack on the judicial process and the rule of law. Because they are so important, the damage that lawyers can cause is all the greater. Courts have an obligation to supervise, through Rule 11 among other mechanisms, the behavior of lawyers who practice before them.²⁷ To the Judge, hoping for another entity to put a stop to atrocious behavior was not appropriate.

The Judge's view prevailed when the case was taken en banc. Writing the majority opinion upholding sanctions, Judge Barksdale conceded that civility and ethics rules are to generally be enforced by other bodies,²⁸ but he concluded that courts do have a clearly prescribed role to play—the one given to them by Rule 11—in enforcing some norms.²⁹ Against this view, Judge King dissented on the grounds that intent to embarrass and self-promote are too commonly found to constitute exceptional circumstances, given the potentially legitimate purpose in filing the writ.³⁰ On the one hand, Judge King's dissent stems from the potential chaos generated by allowing widely-observed, if unsavory, characteristics to form the basis of sanctions.

On the other, her disagreement seems to flow from a tolerant view of certain litigation behavior: "We, as appellate judges, operate at a far remove from the business of collecting judgments or effecting settlements. We ought to refrain from excoriating a lawyer based upon our own sensibilities"³¹ Here, Judge King's criticism is not explicitly based on efficiency. Instead, it seems based on a degree of uncertainty about how strictly the norm of civility ought to be set regardless of the cost its enforcement would entail.

²⁷ *Id.* at 797 (Barksdale, J., dissenting).

²⁸ 332 F.3d at 808.

²⁹ *Id.*

³⁰ *Id.* at 814 (King, J., dissenting).

³¹ *Id.* at 815.

While sensitive to the inefficiencies created by requiring mini-trials on attorney behavior,³² Judge Barksdale was much more certain of the need for high standards of behavior for lawyers. The reasons for this—the link he sees between attorney behavior and the legal system—has been discussed above. What the *Whitehead* opinions and Judge Barksdale's refusal to shrug off a lawyer's incivility proves is that he is willing to stand up for that connection. Against the cynicism that many of us feel about the civility, integrity, and competency of lawyers, the Judge refuses to "dumb down" his expectations for the bar.³³

Crediting Lawyers' Integrity

This refusal to lower expectations has a secondary effect. Because the Judge expects so much from lawyers, he grants them a great deal of respect. This makes all the sense in the world because, after all, imposing high standards on lawyers is based on their importance to the overall project. Thus, the same theme leads to the judge regularly placing a great deal of faith in lawyers' competency and integrity.

In *Guidry v. Dretke*,³⁴ Judge Barksdale wrote the majority opinion for a divided panel upholding a district court's grant of habeas relief to Howard Guidry who had been convicted of murder for remuneration and sentenced to death by a Texas state court. The habeas claim was based on an alleged violation of Guidry's right against self-incrimination. For present purposes, the Judge's wide-ranging opinion is notable because of the weight it accorded to testimony by lawyers concerning statements made to them by the police officers.

³² See *supra* note 28 and accompanying text.

³³ For another example of the Judge taking on intemperate counsel, see *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404 (5th Cir. 1994). In *Travelers*, defendants appealed a district court judge's refusal to recuse himself in their civil case when the judge belonged to social organizations in which colleagues of plaintiff's counsel and directors of the plaintiff were members. In addition to filing a motion filled with "intemperate (if not contemptuous)" allegations, defense counsel actually released a song attacking the integrity of the district court. *Id.* at 1408-09 & 1409 n.6. The Judge denied defendants' appeal on the merits and further held that the appeals were designed to harass and therefore sanctions appropriate. See *id.* at 1413.

³⁴ 397 F.3d 306 (5th Cir. 2005).

In March 1995, the officers had questioned Guidry, in jail at the time pending an unrelated bank robbery charge. During this questioning, Guidry confessed to participating in the murder for remuneration. The circumstances surrounding the confession were controversial. Guidry claimed that he had requested his attorney (retained for the robbery charge) prior to the interrogation and had been subsequently told by detectives that the attorney agreed that the questioning could continue outside of his presence. The detectives, on the other hand, claimed that Guidry had never asked for his lawyer and that they had never spoken to his robbery attorney.

Crucially, Guidry's attorneys for the murder trial stated (along with another attorney who had no connection with Guidry) that the same detectives told the attorneys that they (the detectives) *had* been given permission by Guidry's robbery attorney to question Guidry on the murder charge. Confronted with this testimony, the detectives asserted that they said no such thing to the murder-case attorneys. After conducting an evidentiary hearing, the state trial court denied Guidry's motion to suppress the confession, and Guidry was later convicted.

Guidry pursued state habeas relief and was denied. He filed a federal petition and requested an evidentiary proceeding regarding the involuntary confession issue. The district court agreed to do so, and subsequently granted the habeas petition. The state centered its appeal to the Fifth Circuit on dual claims that the district court (1) abused its discretion in holding an evidentiary hearing when such a hearing could only serve to rehash testimony from state court and (2) improperly substituted its credibility determinations for those of the state court after the evidentiary hearing.

Judge Barksdale wrote the opinion for the panel majority, upholding the district court's decision. On the evidentiary hearing issue, the opinion noted first that the district court had no way of knowing whether the witnesses' testimony would be the same during the second hearing. Moreover, the deference owed to state courts under AEDPA did not prevent the district court from testing the unreasonableness of the state court's factual

determinations through an evidentiary hearing.³⁵ Notably, the fact that *lawyers* had testified in state court seemed to matter greatly. The state court's implicit conclusion that the lawyers testified falsely was, to the majority, "too extraordinary to avoid development through an evidentiary hearing in district court."³⁶ That is, the presumption of lawyers' integrity warranted a closer look.

As to the district court's substantive determination, Judge Barksdale's opinion naturally focused on the four lawyers' testimony. The state court had discussed the conflicting testimony of Guidry and the detectives, but not that of the lawyers and the detectives. The opinion continued:

The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, *where the witnesses are apparently credible*, brought into question whether [the decision was unreasonable]. After reviewing the demeanor of [the d]etectives ... while observing the credible testimony of the four lawyers and Guidry, the district court ... was in an even better position not to accept the trial court's findings.³⁷

The opinion does not say so, but one is left with the distinct impression that the witnesses' status as lawyers made them particularly credible. Such a determination would be entirely consistent with the Judge's more general commitment to promoting, expecting, and respecting excellence in lawyering.

Crediting Lawyers' Competency – Ineffective Assistance Claims

Along with a rebuttable presumption of lawyers' integrity, a rebuttable presumption of lawyers' competency runs through Judge Barksdale's opinions. The "rebuttable" qualifier is key—although the Judge might presume lawyerly competency as an initial matter, of course the facts of any case lead wherever they

³⁵ In fact, Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts specifically contemplates the district court's discretion to hold an evidentiary hearing, subject to § 2254(e)(2)'s bar on evidentiary hearings to develop facts not presented by the petitioner in the state court. See *Guidry*, 397 F.3d at 323.

³⁶ *Id.* at 324.

³⁷ *Id.* at 327 (emphasis added).

do. Nevertheless, the presumption of reasonable and skillful behavior by lawyers is apparent.

Obviously, the question of lawyer competency often arises in the context of Sixth Amendment ineffective-assistance-of-counsel ("IAC") claims. In truth, Sixth Amendment opinions—especially habeas claims based on state convictions—are *not* likely to show very much about a judge's view of lawyerly competency. First, given the deference accorded to state habeas decisions under AEDPA³⁸ and the high burden required to prove deficient performance in any IAC analysis,³⁹ it is hard for judges to act in good faith and not have their opinions reflect the presumption of competency described this Article would attribute to Judge Barksdale. Moreover, because courts are able to omit a discussion of deficient performance and simply rely on there being no prejudice to the defendant under the test for IAC,⁴⁰ there are relatively few decisions that even tackle the issue of deficient performance *vel non* at all.

Nevertheless, it is unsurprising that Judge Barksdale recognizes the difficult and sensitive nature of defense counsel's work when conducting an IAC analysis. For instance, in *St. Aubin v. Quarterman*,⁴¹ the Judge refused to find that defense counsel performed deficiently by not raising his client's mental-health history during the punishment stage of his murder trial. He concluded that the decision to avoid opening the door to prior bad acts associated with that history was likely the result of a thoughtful litigation strategy.⁴²

While recognizing the discretion necessarily granted counsel over strategic matters, the Judge *is* willing to entertain defi-

³⁸ 28 U.S.C. § 2254(d)(1)-(2) (2006) (review only to determine if state decisions were unreasonable application of facts or law).

³⁹ See, e.g., *Soffar v. Dretke*, 368 F.3d 441, 471 (5th Cir. 2004) ("[J]udicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" under the first-part of *Strickland's* test for IAC).

⁴⁰ See, e.g., *United States v. Fuller*, 769 F.2d 1095, 1097 (5th Cir. 1985).

⁴¹ 470 F.3d 1096, 1102-03 (5th Cir. 2006)

⁴² *Id.* at 1103. See also *United States v. Pierce*, 959 F.2d 1297, 1301-04 (5th Cir. 1992), in which Judge Barksdale observed the competence of defense counsel where (1) the complained-of failure consisted only of the failure to raise Fourth Amendment issues for which his client had no standing and (2) counsel aggressively cross-examined prosecution witnesses.

cient performance claims in cases of simple negligence. In *Ladd v. Cockrell*, the defendant was convicted of capital murder and sentenced to death after a sentencing phase in which defense counsel put forth no mitigating evidence regarding the defendant's difficult childhood.⁴³ Judge Barksdale's opinion noted that defense counsel's failure to investigate further when the fact of a juvenile arrest was raised and no juvenile records had been provided to him *could* be deficient performance (when coupled with the failure to provide any mitigating evidence).⁴⁴

St. Aubin and *Ladd* become easily reconcilable when one places them in the context of Judge Barksdale's commitment to lawyers. To the Judge, thoughtfully considering litigation options is the heart of a lawyer's job. Thus, he will not countenance second-guessing of those good faith decisions. However, negligence like the kind alleged in *Ladd* is to be rejected at all times. Avoiding using hindsight to evaluate strategic decisions while chiding attorneys for a failure of appropriate effort reflects the balance in the Judge's opinions between expectations of, and respect for, lawyers.

Crediting Lawyers' Competency – Standing

The view of lawyers as essentially competent unless demonstrated otherwise shows up elsewhere. For instance, in *Doe v. Tangipahoa Parish School Board*,⁴⁵ a father brought a claim against the local school district on the grounds that the school board's practice of praying before meetings violated the Establishment Clause. Judge Barksdale authored the majority opinion for the three-judge panel, concluding that the prayers fell outside any legislative prayer exception because they were uniformly Christian.⁴⁶

⁴³ 311 F.3d 349, 357 (5th Cir. 2002).

⁴⁴ *Id.* at 359. The opinion concluded that, in any event, the defendant was not prejudiced by the arguably deficient performance. *Id.* at 359-60. See also *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000) (prejudice not required to be presumed under law at time of conviction when defense counsel slept for unidentified segments of trial), *reh'g granted en banc, vacated by* 234 F.3d 1339 (5th Cir. 2000).

⁴⁵ 473 F.3d 188 (5th Cir. 2006), *reh'g granted en banc, vacated by* 478 F.3d 679 (5th Cir. 2006).

⁴⁶ See *Marsh v. Chambers*, 463 U.S. 783 (1983) (establishing exception). Judge Barksdale's opinion assumed *arguendo* that *Marsh* could be applied to school board

In the father's original amended complaint, he asserted that he had attended school board meetings that began with prayer. In response, the board denied that assertion, but only for lack of information. Eventually, the sides agreed to a consent judgment leaving the Establishment Clause question as the only open issue. At that point, they also agreed to a set of stipulated facts, none of which specifically addressed the father's attendance at meetings or standing generally. The order regarding the stipulations, however, did note that the father and his sons would, if necessary, testify as to the facts alleged in the amended complaint.⁴⁷ At no point in the proceedings before the district court or the court of appeals did the board contest the father's standing or suggest that the father had not attended the board meetings.

In his panel opinion, the Judge dealt with the issue of standing *sua sponte*. He held that the board's failure to (1) challenge the father's assertion from the amended complaint or (2) contest standing more generally was an implied admission that the father had, in fact, attended a meeting: "[T]he [b]oard's decision to proceed on the merits of [the father's] claim, without challenging either that he attended [b]oard meetings or was offended by them, permits an inference that the [b]oard conceded these allegations in [the] complaint."⁴⁸

Judge Barksdale's implied admission analysis in his panel opinion rested on a fundamental view of lawyerly competence. Standing cannot be waived,⁴⁹ but the facts supporting its existence can be conceded. The question is whether to take the board's silence in the face of the allegations in the amended complaint as a concession regarding the factual allegation of the father's attendance. This, in turn, depends largely on one's view of the board's lawyers. If the board's lawyers were competent,

meetings. *But see* 473 F.3d at 205 (Stewart, J., dissenting) (contending that the *Marsh* exception did not apply to such meetings).

⁴⁷ See *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 510-11 (5th Cir. 2007) (en banc) (Benavides, J., dissenting).

⁴⁸ 473 F.3d at 195. Additionally, the opinion analogized to Rule 15(b) of the Federal Rules of Civil Procedure, which allows that "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fed. R. Civ. P. 15(b); *see also* 473 F.3d at 195.

⁴⁹ 494 F.3d at 501 (Barksdale, J., dissenting).

their failure to challenge the complaint's allegations or the standing issue generally can be attributed meaning. Given an obviously important issue in their client's interest (the father's possible lack of standing) and an obviously adverse allegation in the complaint (that the father attended a meeting), a competent lawyer would raise his or her hand if there was something amiss. If, on the other hand, one is more skeptical of the lawyers' competence, their failure to fight on standing is of little probative value.

The issue was not discussed by either the concurrence or dissent in the original opinion. However, after a majority of the circuit's judges voted to rehear the decision en banc,⁵⁰ the standing question became the crux of the case. Chief Judge Jones, writing the majority opinion, refused to infer anything regarding the father's attendance from the board's failure to dispute the allegation in the amendment or the standing issue.⁵¹ Where the stipulated facts omitted anything on that score the majority held that there was no reliable information to be gleaned from the board's lawyers' failure to contest standing or the factual allegations in the amended complaint.

In his dissent to the en banc opinion, Judge Barksdale recapitulated much of his analysis in the panel opinion. In particular, he highlighted the view of lawyer competency underpinning the implied-admission analysis: "Surely, had the [board] felt the [father] lacked standing, it would not have stipulated as it did, including . . . the four prayers that had been presented at [board] meetings Simply put, the [board] more than recognized its requisite adversarial position with the [plaintiffs]."⁵² This conclusion was further supported, again assuming a certain level of lawyer competence, by the failure of the board to dispute the father's attendance on appeal before the en banc court.⁵³

⁵⁰ See *id.* at 496 (noting that the standing issue was raised by the en banc court *sua sponte* and subjected to supplemental briefing).

⁵¹ *Id.* at 497. Chief Judge Jones also wrote that implying admissions regarding standing was impermissible in any event. See *id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 10-11 (1998)).

⁵² *Id.* at 508-09 (Barksdale J., dissenting).

⁵³ *Id.* at 507 (noting that the board did not address the standing issue until prompted by the court).

It would be folly to expect the themes discussed above to provide an interpretive key for the whole of Judge Barksdale's writings. But hopefully the recurring role that his view of lawyers plays in his opinions sheds a bit of light on his jurisprudence. Along this line, it demonstrates a bit more about what the Judge's opinions have meant for the law—they have served as a call to pay greater respect to, and expect more from, lawyers.

CONCLUSION

For those of us fortunate enough to have been able to have one, a clerkship offers not just an inside view of the justice system but also an introduction to being a lawyer. Those of us who have had the privilege of clerking for Judge Barksdale received the most wonderful of such introductions imaginable. The Judge as a boss is brilliant, warm and funny. But so are others whom we have met and will meet during our careers after leaving his chambers. To me, what separates Judge Barksdale is the way he forced me to take my profession—and, by extension, myself—seriously.

The importance of this norm-setting cannot be overstated. At the beginning of my clerkship I would work diligently primarily because I did not want to let the Judge down. At some point during the year, I had internalized his ethic of professionalism so that I did those things because I understood that extreme diligence was the price of *being a lawyer*. This view is largely due to the standards the judge set, both implicitly and explicitly, for lawyers—himself, those of us who worked for him and the members of the bar that practiced before him. Those lessons are not always easily applied—they require us to maintain integrity when it may be advantageous to cut corners, to act competently when it would be easier to let things slide, to behave civilly when the alternative is appealing to say the least. But they are the necessary conclusions for anyone considering the role of lawyers in our society. Lawyers' integrity, competency, and civility are critical because lawyers are critical. Judge Barksdale's writings demonstrate his view that to believe otherwise is to make a serious error. His opinions offer those

who read them a chance to learn a few of the lessons that his clerks are lucky enough to have learned first-hand.

ELECTRONIC DISCOVERY, INFORMATIONAL PRIVACY, FACEBOOK AND UTOPIAN CIVIL JUSTICE

*Rory Bahadur**

INTRODUCTION

This article initially examines the potential obliterating effect of electronic discovery rules, including recently enacted Federal Rule of Evidence 502(d)¹ and changing informational privacy paradigms on the adversarial model of civil justice. Initially, the article demonstrates that traditional paper discovery paradigms are a dynamic, party-driven equilibrium between the search for relevant truthful information and the recognition of private information contained within privacy zones contoured by the attorney-client privilege, the work product doctrine and ethical confidentiality rules.² Electronic discovery and electronically-stored information shifts this equilibrium heavily in favor of the search for the truth and minimizes the role of informational privacy in civil litigation.³ In this regard, electronic discovery resembles the traditional, continental model of inquisitorial justice.⁴

The article next discusses how electronically-stored information “ESI” is driving the current massive privacy shifts in

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¹ Sept. 2008.

² See *infra* Part I.

³ See *infra* Part II.

⁴ See *infra* Part IV.A.

tort law and those associated with online social networking. These broader societal declines in informational privacy related to ESI parallel the decline observed in the electronic discovery paradigm,⁵ and are directly attributable to the space-less nature of electronically-stored information, its ability to be rapidly disseminated and to changes in the nature of social morality.⁶

Finally, this shift in privacy facilitates implementing a justice system combining the best of both the European inquisitorial system and America's adversarial system. The hybrid system ensures the Continental search for material truth is not subjugated by the recognition of privacy as in the adversarial model but retains the laudable, libertarian, societal safeguards of the adversarial system.⁷ This justice model decreases litigation costs, improves public perception of the civil justice system and increases the relevance and applicability of ethical rules.⁸

I. THE ADVERSARIAL EQUILIBRIUM BETWEEN TRUTH AND PRIVACY

The adversarial system of justice is difficult to define.⁹ However, its essential features include:

[a] system for the consideration and resolution of legal disputes under which each side is entitled to have its nonfrivolous contentions considered by interests opposing them and . . . presented in relationship to the opposing contentions, with the assistance of competent counsel, after reasonable notice and opportunity to be heard, to an impartial judge or jury for fair consideration and final decision . . . all in a manner provided by law . . . commit[ted] to the immutable American expectation

⁵ See *infra* Part III.

⁶ See *infra* Part III.C.

⁷ See *infra* Part IV.C.

⁸ *Id.*

⁹ SEAN PATRICK SCALLY, PRESERVING THE ADVERSARIAL SYSTEM OF JUSTICE: CONTINENTAL CIVIL LAW AND THE ROLE OF THE AMERICAN LAWYER: A REASONED ARGUMENT EXTOLLING THE DIALECTICALLY-STRUCTURED SYSTEM OF ARGUMENTATION 1 (1986).

that liberty will be ordered under law only after impartial judgment upon fair consideration of conflicting ideas.¹⁰

Summarily, the central precept of the adversarial system is “out of the sharp clash of proofs presented by adversaries in a highly-structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both parties and society. . . .”¹¹

The goal of the adversarial system is not absolute truth, but “the ‘truth’ so far as it can be known, given the protection of the ‘basic needs of the human personality, including privacy, autonomy, and freedom from humiliation and abuse.”¹² The Federal Rules of Civil Procedure reflect the adversarial system’s sacrifice of ultimate truth for resolution. Rule 1 does not state truth is the objective of our civil system of justice, but instead the rules “secure the just, speedy, and inexpensive determination of every action and proceeding.”¹³ The rule was worded as such to formally acknowledge that fair resolution was not the only aim of the rules, but one that must be balanced against the equally important goals of resolving litigation without undue cost and delay.¹⁴

Discovery or “the principal fact-gathering mechanism in the formal civil litigation process”¹⁵ is an integral part of the adversarial system of civil justice¹⁶ and is “one of the most significant innovations of the Federal Rules of Civil Procedure.”¹⁷ The proc-

¹⁰ *Id.* (quoting A. Sherman Christensen, *Some Reflections on the Nature and Future of the Adversary System*, 30 DEF. L.J. 325, 329 (1981)).

¹¹ *Id.* at 2 (quoting STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM, A DESCRIPTION AND DEFENSE* (1984)).

¹² *Id.* at 2 (quoting WAYNE R. LAFAYE & JEROLD ISRAEL, *CRIMINAL PROCEDURE* 27 (1985)).

¹³ FED. R. CIV. P. 1.

¹⁴ FED. R. CIV. P. 1 (1993 amendments).

¹⁵ Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV 479, 482 (1995).

¹⁶ STEPHAN LANDSMAN, *ABA SECTION OF LITIGATION READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* 4 (1988) (noting that a major assumption of the adversarial system is fairness and equality of the contest and “the primary mechanism for ensuring this equality is pretrial discovery”).

¹⁷ *Hickman v. Taylor*, 329 U.S. 495, 500 (1947); *see also* LANDSMAN, *supra* note 16, at 482-83 (describing discovery as “where most pre-trial disputes are played out and

ess is fundamental in federal notice pleading as the basis for development of a party's factual contentions.¹⁸ The benefits envisioned by the discovery procedures are tempered in practice by the realities of the adversarial system which typically "resulted in bitter, protracted and expensive squabbles over whether or not parties had complied with various discovery requests, and sometimes these disputes completely eclipsed the merits of the action."¹⁹

Even without the inherently adversarial nature of the process, this squabbling is not surprising because the rules include some obviously competing principles; recognition of inaccessible, private information zones and the unearthing of information necessary for the resolution of the dispute.²⁰

Initially the scope of discovery is broad, "[p]arties may obtain discovery regarding any *nonprivileged* matter that is *relevant* to any party's claim or defense," and the court may broaden the scope to permit "discovery of any matter relevant to the subject matter involved in the action."²¹ This broad definition of discovery includes two unquantifiable terms, privilege and relevance, which result in an infinite maze of judicial opinions.²² Providing a check on the breadth of the discovery process and discussed below are three doctrines defining spheres of private

where many cases are effectively won or lost. The principle behind discovery is simple: mutual knowledge of all the relevant facts of a dispute leads to its fair resolution. If the parties, the court and the trier of fact have access to all the relevant facts of a dispute, its outcome at trial will more likely be fair. Moreover, early access to all potential evidence often leads to early settlement. Early settlement avoids costly trials. The primary means to achieve full access to the facts is discovery.").

¹⁸ Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957); see also LANDSMAN, *supra* note 16, at 483 (confirming that "[t]he modern rules of discovery evolved to release the adjudicatory process from the English common law system of writs and formalistic pleadings in which hyper-technical formulas rather than merit or fairness decided cases. Under the common law system, pre-trial disputes focused on the wording of the pleadings rather than on the facts of the case.").

¹⁹ JAMES MOORE & KEVIN SHIREY, *MOORE'S RULES PAMPHLET* 432 (2009).

²⁰ See *infra* Part I.A-D.

²¹ FED. R. CIV. P. 26(b)(1) (emphasis added).

²² A Westlaw search reveals there are thousands of federal cases containing the word privilege and/or relevance. See also case law surrounding FED. R. EVID. 403.

information not accessible by the opposing party, even if they contain dispositive information.

A. The Private Information Protected by the Work Product Doctrine

The work product doctrine is embodied in the federal discovery rules and, though not precisely a privilege, it will be treated as such for the purposes of this paper because in the context of the discovery process it represents and defines a zone of privacy where, absent exceptional circumstances, access to the information and search for the truth are unjustified. "[T]he purpose of the [work product] rule is to protect a zone of privacy for strategizing about the conduct of the litigation itself"²³ It is a tiered doctrine recognizing two distinct levels of privacy, one qualified and the other absolute. The contours of the qualified privacy zone created are such that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent),"²⁴ unless the party requesting the information shows it has substantial need for the information to prepare its case and cannot do so without undue hardship.²⁵

Absolute protection is given to information considered so private it may not be disclosed to the opposing party no matter how relevant or necessary the information otherwise may be. This absolute protection recognizes that "disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" should never be disclosed.²⁶

²³ *Testwuide v. United States*, 2006 WL 5625760, 8 (Fed. Cl. 2006) (quoting *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000)).

²⁴ FED. R. CIV. P. 26(b)(3)(A).

²⁵ FED. R. CIV. P. 26(b)(3)(A)(ii).

²⁶ FED. R. CIV. P. 26(b)(3)(B). Also related to the work product rule is a similar zone of privacy surrounding the information held by non-testifying experts in civil trials. Rule 26(b)(4)(B) states, "A party may not . . . discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial," except in "exceptional circumstances." FED. R. CIV. P. 26(b)(4)(B). Even if the

B. The Private Information Protected by the Attorney-Client Privilege

Another example of an inaccessible privacy zone recognized in discovery is attorney-client privilege. "The modern public purpose underlying [the attorney-client] privilege is to encourage full disclosure without fear that the information [given to the attorney by the client] will be revealed to others, so that clients receive the best and most competent legal advice and representation."²⁷ Information protected by the attorney-client privilege is private so a client can rest assured that communications the client makes to the attorney will be confidential and disclosure cannot be compelled in the action regardless if it would otherwise be discoverable as relevant or even dispositive to the action.²⁸

C. The Private Information Protected by the Rules of Ethics

Model Rule of Professional Conduct 1.6 prohibits an attorney from "reveal[ing] information relating to the representation of a client"²⁹ and therefore also establishes an informational privacy zone. The attorney may only reveal otherwise private information when the client provides informed consent or in the case of certain other limited exceptions not relevant to this article.³⁰ Recognition of this zone of privacy created by the Model

exceptional circumstances exist the adversarial system demands that the party seeking the information from the expert pay both a fee to the expert and pay the opposing party part of the fee it incurred in initially obtaining the expert information. FED. R. CIV. P. 26(b)(4)(C)(i-ii).

²⁷ See 81 AM. JUR. 2D *Witnesses* § 326 (2004) ("The main purpose behind the attorney-client privilege is to promote freedom of consultation of legal advisers by clients. More specifically, the root purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients without fear that confidential information will be disclosed to others so that fully informed legal advice may be obtained and, thereby, promote broader public interests in the observance of the law. Protecting confidential communications between an attorney and a client not only facilitates the full development of facts essential to proper representation of a client but also encourages the general public to seek early legal assistance.").

²⁸ See *Evergreen Trading, LLC ex rel. Nussdorf*, 80 Fed. Cl. 122, 133 (2007) ("The purpose of the attorney-client privilege is to guarantee confidentiality between attorney and client. . .").

²⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004).

³⁰ MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2004).

Rules of Professional Conduct is fundamental to the adversarial justice system.³¹

The attorney-client privilege and work product protection are closely related to ethical confidentiality³² and, like the ethical confidentiality rule, the informational privacy zones they create are so fundamental to adversarial justice that the Rules of Civil Procedure directly address the method by which challenges to the contours of these zones are made.³³

These zones of private information are areas to which the goal of truth seeking must yield. It is a recognition that certain private information which, even if dispositive for resolution of the issue at hand, is unattainable by the parties to the dispute. As a result, litigation in the adversarial system represents a balance between discerning material truth and protecting "basic needs of the human personality, including privacy, autonomy and freedom from humiliation and abuse."³⁴

D. The Mechanics of Accommodating Private Information and Truth

Up until the electronic discovery rules were adopted in 2006, the competing principles of truth seeking and privacy were accommodated by well-defined procedures and motion practice contoured by Rules 26 and 37, which tested the boundaries of what information the opposing party should have access to and that which it could not because the information was private. According to the rules, when a party elects not to produce an otherwise discoverable document claiming it is private (either work product protected or privileged) they must "(i)

³¹ MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [2] (2004) ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively . . .").

³² See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (explaining, "The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege [and] the work product doctrine. . . .").

³³ FED. R. CIV. P. 26(b)(5)(A).

³⁴ SCALLY, *supra* note 9, at 2.

expressly make the claim; and (ii) describe the nature of the [materials] not produced or disclosed . . . in a manner that, without revealing [the actual privileged or protected material], will enable other parties to assess the claim [of privacy].”³⁵

The reason for expressly making the claim and allowing the requesting party to assess the claim is to enable the requesting party to challenge the claim via a motion to compel discovery.³⁶ The adversarial nature of the process is once again highlighted by Rule 37’s requirement that the losing party in the challenge must pay the prevailing party’s expenses “incurred in making the motion, including attorney’s fees.”³⁷

If traditional civil discovery is a forum where the tension between the core elements of the adversarial system, the search for material truth, and the recognition of private information protection, are in a dynamic, party-driven equilibrium, then electronic discovery shifts this equilibrium heavily in favor of the search for material truth.

II. ELECTRONIC DISCOVERY’S EQUILIBRIUM SHIFT

A. *Structural Differences of Electronic Discovery*

Electronic discovery or e-discovery refers to the discovery of ESI.³⁸ ESI is “information created, manipulated, communicated, stored and best utilized in digital form, requiring the use of computer hardware and software.”³⁹ Electronic discovery is extensively covered and developed in many papers and presentations, and a detailed treatment of the differences related to the discovery of paper documents and electronically-stored information is beyond the scope of this piece. However, this brief description of the challenges unique to electronic discovery dem-

³⁵ FED. R. CIV. P. 26(b)(5)(A).

³⁶ FED. R. CIV. P. 37(a)(3)(B).

³⁷ FED. R. CIV. P. 37(a)(5)(A)-(B).

³⁸ Wikipedia, *Electronic Discovery*, available at http://en.wikipedia.org/wiki/Electronic_discovery (last visited Mar. 4, 2009).

³⁹ Kenneth J. Withers, *Electronically Stored information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 173 (2006), available at <http://www.law.northwestern.edu/journals/njtip/v4/n2/3> (last visited Mar. 3, 2009).

onstrates that current adversarial paradigms of discovery are ill equipped to deal with electronically-stored information.

Some of the major distinguishing features of electronically-stored information include volume and privilege screening.⁴⁰

1. Volume

This is perhaps the most significant aspect of electronically-stored information.⁴¹ To put things in perspective:

The average personal computer hard drive today can easily store 60 gigabytes of data—or 60 stacks of paper 85 feet tall—and large organizations' computer networks commonly store information in terabytes, each equivalent to 500 million type-written pages. All this information can be subject to discovery. Members of the bar and public have complained that producing this information in discovery has become increasingly time-consuming, burdensome and expensive.⁴²

One of the biggest reasons for the increase in volume is electronically-stored information involves more replication than paper information.⁴³ Additionally, computers have become the primary means of communicating, effectively replacing the telephone, mail, face-to-face meetings and inter personal conversa-

⁴⁰ *Id.* at 173-85.

⁴¹ *Id.*

⁴² *Electronically Stored Information Target of New Rules*, NEWSL. OF THE FED. CTS. THE THIRD BRANCH, Nov. 2006, available at <http://www.uscourts.gov/ttb/11-06/electronically/index.html> (last visited Mar. 3, 2009).

⁴³ Withers, *supra* note 39, at 174 (explaining, "The primary cause of the tremendous volume of electronically stored information is that computer systems seldom "move" digital information from one place to another, in the same physical sense that paper media is moved from a desk to a file cabinet, mailbox, or warehouse. Instead, electronically stored information is replicated on media in various physical locations. "Sending" an email message, for example, initiates an electronic process by which a pattern of positively and negatively charged electrons on one computer hard drive is replicated on several other computer hard drives, perhaps around the world, until it reaches the destination hard drive and is rendered as an image on the recipient's screen. It is also likely to be replicated on several locations on both the sender's and recipient's hard drive, as well as on network email servers and their backup media. One message becomes several, a process repeated billions of times daily.").

tions.⁴⁴ Each time we use a computer-based communication, mode replication, as previously described, occurs.⁴⁵

Furthermore, hitting the delete key on a computer keyboard does not delete the information in the true sense of the word but merely rearranges it on the computer's storage medium.⁴⁶

2. Privilege Review Costs

Privilege screening or preproduction screening refers to a lawyer's obligation to screen the information provided to an opposing party before responding to a request for production so as to ensure that the information designated as private or undiscoverable by the ethical rules, attorney-client privilege or work product doctrine is not divulged to the opposing party, resulting in a waiver of the privilege.⁴⁷

It fast became apparent in electronic discovery that the cost of producing the data for the producing party could be prohibitive and the typical rule of each party bears its own discovery costs was deemed unfair.⁴⁸ As a result, the case law developed tests to facilitate cost-shifting as a means of remedying the problem of unique prohibitive cost to the producing party in

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (pointing out, "By now, all computer users should be aware that the action of "deleting" an electronic file does little more than change the name and eliminate reference to it in the operating system's list of active files, a situation aptly described by computer forensics expert Joan Feldman as a "witness protection program for bad documents." Not only can the deleted file be easily recovered, but the action of pressing the "delete" key does nothing for the dozens, scores, or hundreds of replicants existing elsewhere on the system, on the network, or on backup media. This fact . . . also frustrates well-intentioned efforts to effectively dispose of outdated, superseded, or surplus electronically stored information.").

⁴⁷ See, e.g., *Harper v. Brinke*, 2007 WL 2509646 (E.D. Tenn. 2007) (discussing waiver of confidential material by disclosure of that material to third parties).

⁴⁸ Withers, *supra* note 39, at 182 (explaining, "The cost of copying and transporting electronically stored information is virtually nil. The costs for the producing side, however, have increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion. Organizations without state-of-the-art electronic information management program[s] in place, which classify information and routinely cull outdated or duplicative data, face enormous (often self-inflicted) costs and burdens. Commentators posited that savvy requesting parties could force settlement of cases simply by threatening electronic discovery.").

electronic discovery.⁴⁹ For example in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,⁵⁰ a federal district court articulated the following eight factors to decide which party should bear the cost of production of electronic discovery:

The specificity of the discovery request; the likelihood of discovering material data; the availability of those data from other sources; the purposes for which the responding party maintains those data; the relative benefits to the parties of obtaining those data; the total costs associated with production; the relative ability and incentive for each party to control its own costs; and the resources available to each party.⁵¹

Similarly, another seven factor test for cost allocation was adopted by the district court in *Zubulake v. UBS Warburg LLC*.⁵²

The extent to which the request is specifically tailored to discover relevant information; [t]he availability of such information from other sources; [t]he total cost of production, compared to the amount in controversy; [t]he total cost of production, compared to the resources available to each party; [t]he relative ability of each party to control costs and its incentive to do so; [t]he importance of the issues at stake in the litigation; and [t]he relative benefits to the parties of obtaining the information.

The exponentially increased cost of privilege screening in electronic discovery is directly related to the volume and the nature of ESI.⁵³ In order to effectively engage in pre-production privilege review:

⁴⁹ *Id.* at 182-83.

⁵⁰ 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

⁵¹ *Id.*; see also Withers, *supra* note 39, at 11 (reiterating the importance of the *Rowe* factors).

⁵² 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

⁵³ Withers, *supra* note 39, at 185 (explaining, "Email is informal in nature and tends to be circulated widely, creating many copies and versions [sic] of the same message with different senders and recipients. In addition, email messages tend to be strung together in 'threads,' making it difficult to parse out the privileged messages from the non-privileged ones. Perhaps the most significant contributor to the cost of privilege screening, however, is fear. In many jurisdictions, the inadvertent production of a document over which a privilege objection should have been raised serves to waive that privilege as applied to that document, or possibly over that category of documents or then subject matter of the document. Even if the jurisdiction in which the litigation is taking

Broad database searches may be necessary, requiring safeguards against exposing confidential or irrelevant data to the opponent's scrutiny. A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties.⁵⁴

In fact, recent estimates suggest preproduction privilege review now makes up seventy-five percent of the cost of electronic discovery.⁵⁵

The following statistics serve to further highlight the unique challenges of dealing with the discovery and associated preproduction privilege review of electronically-stored information. As of 2003, "ninety-two percent of new information is stored on magnetic media, primarily hard disks."⁵⁶ Furthermore, American workers send about twenty-five billion email messages per day.⁵⁷

Under pressure from scholarly publications, think tanks in the field, and practitioners, proposed a series of amendments to the Federal Rules of Civil Procedure to deal with the challenges of electronic discovery.⁵⁸ The amendments became law on December 1, 2006, and resulted in changes to Federal Rules of

place does not recognize this 'privilege waiver' doctrine, there is fear that the inadvertent production of a privileged document in one litigation may serve as a waiver in other jurisdictions in which the party has litigation. This uncertainty results in extremely cautious behavior on the part of counsel, which drives costs up.").

⁵⁴ Laura Catherine Daniel, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663, 665 (2005).

⁵⁵ DANIEL J. CAPRA ET AL., LIMITATIONS ON PRIVILEGE WAIVER UNDER NEW FEDERAL RULE OF EVIDENCE 502 (Sedona Conference Voices from the Desert Series CD-ROM, rel. 25, Nov. 2008) [hereinafter *Sedona Conference*].

⁵⁶ PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003, available at http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf (last visited Jan. 20, 2010).

⁵⁷ Daniel, *supra* note 54, at 664.

⁵⁸ *Id.* at 663-71.

Civil Procedure 16, 26, 33, 34, 37 and 45.⁵⁹ Of these, the changes to Rule 26 and the advisory committee notes regarding privilege waiver are most relevant to this paper.

B. The Electronic Discovery Rules Regarding Privilege Waiver

The 2006 advisory committee notes to Federal Rules of Civil Procedure 26 encourage the use of two devices to reduce the preproduction-privilege-review costs in electronic discovery, and the clawback and quick-peek agreements.⁶⁰ A quick-peek agreement works as follows: “[t]he requesting party is allowed to see his opponent’s entire data set before production. The requester identifies relevant information from his opponent’s mass of information. The producing party then extracts privileged information from the now smaller set and turns over his responsive documents and a privilege log.”⁶¹

A clawback agreement is based on the following premise from the advisory committee notes:

[P]roduction without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. . . . In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation materials.⁶²

Stated another way:

In a clawback arrangement, both parties to a dispute agree in writing that inadvertent production of privileged materials will not automatically constitute a waiver of privilege. If the producing party realizes the disclosure in a reasonable time, he can request the document’s return, or “claw it back,” and the other party must comply. The requesting party is pre-

⁵⁹ Amendments to the Federal Rules of Civil Procedure (2006), available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last visited Jan. 17, 2010); see also FED. R. CIV. P. 16, 26, 33, 34, 37, 45 advisory committee’s notes (2006).

⁶⁰ See FED. R. CIV. P. 26 advisory committee’s notes (2006).

⁶¹ Daniel, *supra* note 54, at 667.

⁶² See FED. R. CIV. P. 26(f) advisory committee’s notes (2006).

sumptively barred from using the privileged document to further his client's case.⁶³

The advisory committee notes to Rule 26 encourage the use of quick-peek and clawback agreements, but the substantive law regarding whether or not disclosure pursuant to these agreements constitutes waiver cannot be modified by the Rules of Civil Procedure since the Rules Enabling Act forbids the rules from abridging enlarging or modifying any substantive right.⁶⁴

The case law is also clear that Rule 26(b)(5) only presents a procedural mechanism for resolving disputes about whether privilege was waived through disclosure in electronic discovery and does not provide the substantive law which applies to the resolution of whether or not waiver occurred via disclosure.⁶⁵ Apart from the substance/procedure distinction above, there is controversy as to "whether the Federal Rules of Civil Procedure are an appropriate vehicle for addressing this issue [of privilege], and even if they are deemed to be appropriate, how far civil procedure rules can go to solve a problem that involves aspects of common law, evidence doctrine, and legal ethics."⁶⁶

The civil procedure rules on electronic discovery do not countenance wholesale abandonment of any preproduction

⁶³ Daniel, *supra* note 54, at 666-67.

⁶⁴ 28 U.S.C. § 2072(b) (1992) ("Such rules shall not abridge, enlarge or modify any substantive right.").

⁶⁵ Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 233 (D. Md. 2005) ("The proposed amendment does not address the substantive questions whether privilege or work product protection has been waived or forfeited [by the procedures in the proposed amendment to Rule 26(b)(5)]. Instead, the amendment sets up a procedure to allow the responding party to assert a claim of privilege or of work-product protection after production It is a nod to the pressures of litigating with the amount and nature of electronically stored information available in the present age, a procedural device for addressing the increasingly costly and time-consuming efforts to reduce the number of inevitable blunders . . . [Proposed] Rule 26(b)(5)(2) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information." (quoting *Report to the Standing Committee on Rules of Practice and Procedure, Judicial Conf. of the U. S. by the Advisory Comm. on the Fed. Rules of Civil Procedure*, Sept. 2005 at 26)). See also FED. R. CIV. P. 26(b)(5) advisory committee's note (2006).

⁶⁶ Daniel, *supra* note 54, at 673 (quoting KENNETH J. WITHERS, TWO TIERS AND A SAFE HARBOR: THE ELECTRONIC DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 3 (Aug. 25, 2004) (unpublished manuscript), available at <http://www.krollontrack.com/publications/twotiers.pdf> (last visited Jan. 17, 2010)).

privilege review, but rather address only inadvertent disclosure.⁶⁷ What the rules facilitate is an attorney still conducting a preproduction privilege review to prevent private information from being disclosed. This is balanced against the reality that in the era of vast information stored information will be inadvertently disclosed.⁶⁸ However, the Federal Rules of Civil Procedure are not the only rules drafted to facilitate electronic discovery.

In an attempt to further encourage attorneys to engage in quick-peek and clawback agreements, Federal Rule of Evidence 502, specifically 502(d), was promulgated and became law in September 2008.⁶⁹ The Senate debate and passage of this rule unequivocally indicates Rule 502(d) was specifically designed to reduce the cost of preproduction-privilege review and is considered the most important and innovative part of the rule.⁷⁰

The rule goes further to encourage the use of clawback and quick-peeks than the amendments to the Federal Rules of Civil Procedure because:

Rule 502(d) is not limited to *inadvertent* disclosure. It protects against waiver by disclosure of any type, whether inadvertent or intentional. It thus permits a party to open its files to an adversary; allows the adversary to decide what information it considers relevant and wants to use; and permits the disclosing party to assert privilege thereafter [(or not to do so)—as in the quick-peek approach to electronic discovery].⁷¹

Each side benefits from reduced costs under the 502(d) regime because under a 502(d) agreement rather than examining its entire database and then the opposing party's entire data-

⁶⁷ FED. R. CIV. P. 26(b)(5) advisory committee's note (2000) (explaining, "The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues").

⁶⁸ See *supra* Part II.A.2.

⁶⁹ Dean Gonsowski, *The E-Discovery Plot Thickens with the Passing of FRE 502*, INSIDE COUNSEL, Jan. 26, 2009, available at <http://www.insidecounsel.com/Issues/2009/January-2009/Pages/The-EDiscovery-Plot-Thickens-with-the-Passing-of-FRE-502.aspx> (last visited Jan. 20, 2010).

⁷⁰ *Sedona Conference*, *supra* note 55, at 18:40-19:42.

⁷¹ Gregory P. Joseph, *Impact of 502(d) on Protective Orders*, NAT'L L.J., Nov. 17, 2008 (emphasis added).

base, each party examines only the adversary's entire database. If the 502(d) type agreement was not entered into, each party would have to do two entire database searches. The first search would be of its own storage medium to remove all private information, and the second would be of their opponent's storage medium after their opponent had located and redacted private information.

Instead, under the type of agreement facilitated by 502(d), each party would only be responsible for a search of one entire storage medium: its opponent's. The party would be responsible for deciding which of the requested data on its own storage medium is subject to a privacy claim only after the other side identified and made a specific request for data they identified as relevant to discovery. So instead of searching two entire storage media, the party would search only its opponent's entire storage medium and be responsible only for reviewing a subset of its own stored information, comprised solely of documents identified by the adversary as relevant. As to this smaller data set identified by the adversary, the party need only decide which are privileged and which are not.

To further illustrate, two corporations with huge computer storage systems are opposing parties in a federal suit. Both parties agree to grant full access to their database to the opposing side. The parties get their own computer experts to go through the opposing party's data, and then the searching party identifies documents on its opponent's storage medium it wants to acquire. The producing side either could agree to produce the document or, pursuant to a 502(d) agreement, claim it is private and therefore undiscoverable.⁷²

By enacting Federal Rule of Evidence 502(d), Congress is strongly encouraging the use of quick-peek and clawback agreements in litigation, allowing the court to mandate entry into these agreements even over the objection of the parties.⁷³ For example, the court may enter a 502(d) confidentiality order *sua sponte* in order to minimize the risk in cases where a party's preproduction privilege review burden is disproportionately

⁷² See *supra* Part II.B-C (explaining the use of quick-peek agreements).

⁷³ *Sedona Conference*, *supra* note 55 at 20:45-21:02.

lower than the opposing party's, and failure to enter into an agreement would be an advantage to the party with the lower burden.⁷⁴ Additionally, suggestive of 502(d)'s larger impact than the Federal Rules of Civil Procedure on the electronic discovery landscape is Congress' more direct and substantial involvement in enacting evidence rules which affect evidentiary privileges than in enacting procedural rules.⁷⁵

The rule even states that the agreed upon terms of non-waiver, despite disclosure, is not a waiver of the privilege in any other federal or state proceeding.⁷⁶ As a result, arguments abound that Rule 502(d) may not be constitutional because it potentially infringes upon the states' substantive common law regarding waiver of privilege through disclosure.⁷⁷ While the rules clearly reduce the preproduction cost associated with electronic discovery, the new rules represent a litigation sea change, shifting the previously described equilibrium between privacy and discovery of truth heavily in favor of discovery of truth.

C. Altering the Balance between Privacy and Truth: The Cat Leaves the Bag

The innovation countenanced by 502(d) permits the party to make the privilege or protection claim even after the opposing party identifies the information.⁷⁸ In other words, under a 502(d) agreement, if the information requested and already in the hands of the opposing party is subsequently deemed to be

⁷⁴ *Sedona Conference*, *supra* note 55 at 20:45-21:02.

⁷⁵ Compare 28 U.S.C. § 2074(a) (1992) (indicating that if Congress does not object to the procedural rules suggested by the Judicial Conference and Supreme Court they automatically become law on December 1 of the year they were submitted to Congress) with 28 U.S.C. § 2074(b) (1992) (requiring an affirmative act by Congress to adopt an evidentiary rule such as 502(d) which affects an evidentiary privilege).

⁷⁶ See FED. R. EVID. R. 502(d).

⁷⁷ See Julie Cohen, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 655-63 (2008). See also FED. R. EVID. 502(f) (stating that the rule applies even where state law forms the rule of decision).

⁷⁸ 154 CONG. REC. S1317, S1318 (Feb. 27, 2008) (explaining that "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.").

privileged or protected, it cannot be entered into evidence because 502(d)'s protection of privilege applies even to information intentionally disclosed during preproduction-privilege review.⁷⁹

In protecting the attorney-client privilege or work product protection regarding information already disclosed pursuant to a 502(d) agreement, the rule ensures such information cannot be entered into evidence.⁸⁰ Despite the maintenance of the privilege and inadmissibility into evidence, it is important to note that introduction into evidence is not necessarily the most harmful effect of disclosing information because:

A litigation adversary can "use" the document containing your privileged or protected communication in many ways that give you no opportunity to object. For example, the adversary may formulate questions or trial strategies that are based on or informed by privileged or protected documents. In that event, objecting may be either impossible or pointless. Similarly, if the adversary has fact or expert witnesses review and rely on privileged or protected documents (of course, before the claims are asserted and sustained), it will be impossible to have those witnesses "unlearn" that information and difficult to excise the resulting knowledge from their testimony or opinions.⁸¹

So in effect the label of privilege or work product is simply a useless moniker because the essence of the privilege, or the private area to which the adversary traditionally did not have ac-

⁷⁹ *Sedona Conference*, *supra* note 55, at 20:45-21:02.

⁸⁰ See Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L. J. 853 n.1 (1998) (explaining that attorney-client privilege material "cannot be disclosed at any future time, nor can it be given in evidence in another suit, although the client, from whom the communication came, is no party and has no interest in it.") (quoting *People v. Adam*, 280 N.E.2d 205, 207 (Ill. 1972)).

⁸¹ Jim Beck & Mark Herrmann, *New Federal Rule of Evidence 502 – A Modest Improvement?*, DRUG & DEVICE LAW, Sep. 23, 2008, available at <http://druganddevicelaw.blogspot.com/2008/09/new-federal-rule-of-evidence-502-modest.html> (last visited Jan. 5, 2010); see also Daniel, *supra* note 54, at 682 (explaining that "it is virtually impossible for the receiving lawyer in such an arrangement to erase from memory the privileged material that he has glimpsed. A clawback or quick-peek, despite all its protective clauses, simply cannot guarantee . . . against strategic use of the privileged information by opposing counsel in the case covered by the agreement"); see also *Sedona Conference*, *supra* note 55, at 39:15-40:35 (explaining that it does not take a "particularly clever adversary" to craft discovery requests to get at the factual matter contained in a statement which is attorney-client privileged.).

cess, no longer exists. Of course factual information conveyed in a communication to the attorney was never itself privileged. For example, a client would not have to answer the question, "What did you tell your attorney about person X's involvement in the alleged scheme to defraud?" but person X could be properly asked in deposition what his role was in the scheme to defraud.⁸²

The key distinction is that, before the advent of electronically-stored information this type of information was in a definable, finite space and quite likely located in a physical box or file, which was identifiable. This identifiable physical space containing the privileged information could be tightly guarded and not produced to the adversary in discovery. The adversary, although free to ask, would probably not even be clued in to X's involvement in the scheme since under a paper discovery model it would not be privy to the communication between the client and the counsel.

However, in the age of electronic discovery, if that communication is made by email and even if that email is subsequently deleted, it simply shifts to a different position on a data-storage medium. Under the privilege review procedure encouraged by 502(d) and expressly supported by 26(b)'s advisory language regarding the use of quick-peek agreements, the existence of that email, whether ultimately admissible into evidence or not, is knowable by the opponent who is given the entire data collection to observe.⁸³

An element of the privilege and work product doctrines essential to the functioning of our adversarial system of justice is privacy.⁸⁴ The purpose of this privacy is to ensure public faith in

⁸² *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (explaining, "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831(E.D. Penn. 1962))).

⁸³ See *supra* Part II.B. (discussing the use of quick-peek and clawback agreements).

⁸⁴ See Liesa L. Richter, *The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor's New Clothes*, 43 WAKE FOREST L. REV. 979, 1031 n.212 (2008) (explaining that "In recognizing the work-product doctrine, the Supreme Court noted the need for a lawyer to "work

the functioning of the adversarial system, and also to ensure that our civil system of justice remains true to its primary goal, which is resolution often at the expense of the truth.⁸⁵ The electronic discovery protocols therefore represent a decline in informational privacy and hence a change in the structure of the adversarial system of justice. The use of computers and ESI is also obliterating informational privacy on a broader societal level. An examination of the decline in informational privacy in tort law and due to the phenomenon of online social networking is illustrative.⁸⁶

III. ESI'S ROLE IN DECREASING TORT PRIVACY AND THE VOLUNTARY RELINQUISHMENT OF INFORMATIONAL PRIVACY

A. *The Decline of Informational Privacy in Tort*

The concept of privacy in tort is recent and its development occurred only in the twentieth century.⁸⁷ The development of the law of privacy is tied to an 1890 Harvard Law Review article written by Samuel D. Warren and Louis D. Brandeis.⁸⁸ Informational privacy is defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."⁸⁹

with a certain degree of privacy." As with attorney-client privilege, the Court adopted a partly instrumental justification for protecting attorney work product. The court noted the importance of competent legal representation to society as a whole and expressed concern that counsel would decline to record work product in an effort to conceal it from his adversary in the absence any protection from disclosure, resulting in inefficiency and less competent representation."); see also Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113, 1151-52 (2007) (confirming that "[The confidentiality principle] creates a zone of privacy that cannot be breached by a too-inquisitive government, and thus enhances the autonomy and individual liberty of citizens;" additionally, when lawyers keep client information confidential, they "demonstrate the moral values of trust and loyalty."); Lucas T. Charleston, *In re Cardinal Health, Inc. Securities Litigation*, 53 N.Y. L. SCH. L. REV. 167 n.1 (2008/2009) (further explaining that "[t]he work-product doctrine . . . is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries").

⁸⁵ See *infra* Part IV.A.

⁸⁶ See *infra* Part III.

⁸⁷ DAN B. DOBBS, *THE LAW OF TORTS* 1197 (2000).

⁸⁸ *Id.*

⁸⁹ A.F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

To this end, tort law recognizes the tort of public disclosure of private facts.⁹⁰ “[T]he elements of the public disclosure of private facts tort [are] . . . (1) public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern.”⁹¹

The existence of this informational privacy-based tort is in jeopardy and this jeopardy has exponentially increased because of ESI’s expansion of the newsworthiness doctrine. Even before the impact of ESI the constitutionality of the tort was questioned and a few jurisdictions rejected the tort completely.⁹² Where the tort was rejected, it was largely because the tort requires the information revealed to be information which is not of public concern or, in other words, information that is not newsworthy, even before the popularity of the computer, was interpreted inexactly and broadly.⁹³

The following pre-ESI language from the Supreme Court in *Florida Star* defines newsworthy information as any truthful information that is published or disseminated by the media and seems to question whether liability is at all possible for this type of publication. “Where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, **if at all**, only when narrowly tailored to a state inter-

⁹⁰ *Taus v. Loftus*, 151 P.3d 1185, 1207 (Cal. 2007).

⁹¹ *Id.*

⁹² See, for example, *Hall v. Post*, wherein North Carolina rejects this tort as being unconstitutional:

[A] cause of action predicated on public disclosure of private facts depends for its success on the truthfulness of the published material. The Supreme Court of the United States has specifically recognized that “it is here that claims of privacy *most directly confront* the constitutional freedoms of speech and press. Thus, it is obvious here . . . that the branch of the invasion of privacy tort which the plaintiffs seek to have us adopt is constitutionally suspect and, even if it ultimately manages to survive constitutional review, would tend to add to the tension already existing between the First Amendment and the law of torts Accordingly, we reject the notion of a claim for relief for invasion of privacy by public disclosure of true but “private” facts.

372 S.E.2d 711, 716-17 (N.C. 1998).

⁹³ *Id.* at 714 (using the terms newsworthy, of public interest, and of legitimate public concern interchangeably); see also *Florida Star v. B.J.F.*, 491 U.S. 524, 553 (1989) (explaining in the dissenting opinion that “[t]he trend in ‘modern’ jurisprudence has been to eclipse an individual’s right to maintain private any truthful information that the press wished to publish”).

est of the highest order.”⁹⁴ In *Bartnicki v. Vopper*,⁹⁵ the Supreme Court arguably went further and extended the First Amendment based, newsworthiness defense to publication “disclos[ing] the contents of an illegally intercepted communication.”⁹⁶

The scholarship is also unhelpful in providing a meaningful, limiting, definition of newsworthiness.⁹⁷ The Restatement (Second) of Torts reluctantly admits newsworthiness is defined

⁹⁴ *Id.* at 541 (emphasis added).

⁹⁵ 532 U.S. 514 (2001).

⁹⁶ *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001); see also VICTOR E. SCHWARTZ ET AL., PROSSER WADE AND SCHWARTZ'S: TORTS CASES AND MATERIALS 971(11th ed. 2005) (“In [this case] defendant’s broadcast plaintiffs’ taped cell phone conversations that had been intercepted and recorded by an unknown person in violation of federal and state law. The tape had been left with Vopper, a radio talk show host who, knowing of their illegal source, later broadcast the tapes, revealing plaintiffs’ telephone numbers together with private information about the teachers’ union tactics in a labor dispute The Court held that illegally intercepted phone calls later broadcast by others were protected by the First Amendment [While] the majority determined the legal garnering of the tape was critical . . . the Court’s opinion puts much emphasis on the newsworthiness of the information weighing that against diminished privacy interests.”).

⁹⁷ See, for example, Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual’s Image over the Internet*, 49 SANTA CLARA L. REV. 313 (2009), proposing a test which determines newsworthiness according to public figure status or “Voluntary Ascension to Position of Public Notoriety.” The problem with this test is that it, like other California Courts, confuses the public figure defense to defamation with the concept of newsworthiness. For example, in *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823 (C.D. Cal. 1998), the district court applied California law using this as a factor in the test for newsworthiness); Ariella Goldstein, *Privacy from Photography: Is There a Right Not to Be Photographed Under New York State Law?*, 26 CARDOZO ARTS & ENT. L.J. 233, 247 (2008) (referring to Prosser’s concept of newsworthiness, “the public [has the right] to know what is going on in the world. . . . [and] all events and items of information which are out of the ordinary humdrum routine,” and realizing the limitless nature of the exception to the tort by accepting newsworthy information as synonymous with “other matters of public interest”); Jeff Dendy, *Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 167 (1997) (citing RESTATEMENT (SECOND) OF TORTS § 652D (Special Note 1977) (curiously advocating for the Restatement’s meaningless standard to determine what is newsworthy when the Restatement itself notes the tort is constitutionally suspect and “[i]t has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment.”). The Restatement’s definition of what is newsworthy is also problematic, diffuse, and provides no basis for a useful definition of newsworthiness. See RESTATEMENT (SECOND) OF TORTS § 652D cmts. g-h (struggling to define the meaning of “newsworthiness”).

by those who publish and broadcast the news.⁹⁸ News is also defined broadly and is “not ‘limited to the dissemination of . . . current events’; rather, it ‘extends also to information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general.’”⁹⁹

Before ESI, in 1977, at the time of the Restatement’s comment, news was information provided by a discrete set of media corporations.¹⁰⁰ Today however, with the advent of the computer and internet communications, the term “those who publish and broadcast the news” refers to anyone with a personal computer and internet access. For example, reports of the February 25, 2009 crash and pictures of the wreckage of a Turkish Airliner on approach to an airport in Amsterdam were first published not by one of the mainstream media corporations but by the online social networking site, Twitter.¹⁰¹ Other examples abound of

⁹⁸ *Id.* special note, cmt. g (“To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term [newsworthiness], as a glance at any morning paper will confirm.”).

⁹⁹ Ariella Goldstein, *Privacy from Photography: Is There a Right Not to Be Photographed Under New York State Law?* 26 CARDOZO ARTS & ENT. L.J. 233, 247 (2008) (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 413 (1960)).

¹⁰⁰ See *Cable and the Decline of the Big Three*, Encyclopedia.com, available at <http://www.encyclopedia.com/doc/1G2-3468303143.html> (last visited Jan. 20, 2010) (revealing that “Before the 1980s the ‘Big Three’ networks—ABC, CBS, and NBC—were practically television’s sole providers of national news and sporting events, major Hollywood releases (which were edited for content), and original dramatic series.”).

¹⁰¹ Claudine Beaumont, *Amsterdam Plane Crash: Twitter Social Media and the Anatomy of a Disaster*, TELEGRAPH, available at <http://www.telegraph.co.uk/scienceandtechnology/technology/twitter/4806238/Amsterdam-plane-crash-Twitter-social-media-and-the-anatomy-of-a-disaster.html> (last visited Mar. 3, 2008).

The playing out of major events in the world of blogs and social media is becoming an ever more familiar tale. Today’s plane crash just outside Schiphol Airport in Amsterdam broke first on Twitter, the popular microblogging service. Jonathan Nip, who lived near the scene of the accident, was one of the first to tweet about the crash. “Looking at a crashed aeroplane near Schiphol,” he wrote, just moments after the plane came down. “A lot of emergency services rushing to the scene,” he updated, a few minutes later. “Still no more info. Can’t find any info on the net.”

It’s the last part of that tweet that’s interesting, because it underlines the shifting dynamic of breaking news. Here was an eyewitness to an event who was able to broadcast the latest information far quicker than traditional broadcasters could. The internet, which Jonathan Nip usually relies on for

online social networking sites disseminating information or news traditionally disseminated by large news corporations.¹⁰²

ESI's impact on newsworthiness is clear as the internet surpasses or is rapidly surpassing traditional media as the source of news.¹⁰³ One of the reasons the internet is becoming the primary source of news is a demographic shift described by the BBC as follows:

The challenge for big media players like the BBC is to stay relevant to young men and women reared on a diet of MP3s and iPods.

This is a generation for whom media means MySpace, Flickr, YouTube or any of the other new web services.

....

The popularity of sites that bring together various news sources, like Google News, is a sign of how the relationship between the news provider and consumer is changing.

The time when people accepted without question a newspaper's or broadcaster's view of the world is on the way out.

It is being replaced by a universe in which readers can compare and contrast information, where trust has to be earned.

news and facts, was being outpaced by his own direct experiences, which he in turn was sharing with the world via the medium of Twitter.

Id.

¹⁰² See *id.* (explaining that social networking was involved in disseminating news about "last year's earthquakes in China, . . . the Mumbai terrorist attacks, and [the] aircraft [that] crashed-landed in the Hudson river. Twitter [also] helped many people caught up in the Australian bush fires to find a path through the flames . . .").

¹⁰³ See Pew Research Center for the People & the Press, *Internet Overtakes Newspapers as News Outlet*, Dec. 23, 2008, available at <http://people-press.org/report/479/internet-overtakes-newspapers-as-news-source> (last visited Sept. 13, 2009) (indicating that fifty-nine percent of Americans under thirty now get their news from the internet); see also Alex Mindlin, *Web Passes Papers as News Source*, N.Y. TIMES, Jan. 4, 2009, available at http://www.nytimes.com/2009/01/05/business/media/05drill.html?_r=2 (last visited Jan. 5, 2010) (revealing that the percentage of people who used the internet as their primary news source doubled from 2008-09).

This trend is strongest among young, well-educated professionals who value their ability to shape the news to meet their needs and interests.

The danger for mainstream media outlets is that they risk becoming increasingly marginalised by a generation *who want the news they want, when they want and in whatever shape they want*.¹⁰⁴

This shift to ESI-based news sources renders obsolete, the Restatement's assertion that mainstream media defines what news is and leads to a vast expansion of what the meaning of news and hence newsworthiness is. News has now become whatever a person wants to see and not necessarily what a media giant determines is appropriate.¹⁰⁵ "The Framers of the First Amendment surely did not foresee the advances in science that"¹⁰⁶ would give rise to this expansive definition of news and hence newsworthiness.

If news is now an unstructured, amorphous term describing whatever information people desire access to, then a comparison of the top internet searches of 2008 provides a basis for what news really is. The top internet searches for 2008 on the search engine Yahoo are as follows from most popular to least popular:

1. Britney Spears
2. WWE
3. Barack Obama
4. Miley Cyrus
5. RuneScape

¹⁰⁴ Alfred, Hermida, *Young Challenge Mainstream Media*, BBC NEWS, available at <http://news.bbc.co.uk/2/hi/technology/4962794.stm> (last visited Sept. 2, 2009) (emphasis added).

¹⁰⁵ *Id.* Of course what keeps traditional media outlets afloat is advertising revenue and advertisers surely would want to place their product on the media networks providing the information most people want. In essence then, the internet has also changed the nature of news distributed by the traditional media corporations in that successful media corporations need to have audience appeal and numbers which they could then use to lure potential advertisers. Many news organizations such as CNN, for example, cater to the changing nature of news with user-generated news sites such as ireport.com, which consists of stories submitted by users which are not "edited, fact checked or screened before they post." <http://www.ireport.com/about.jspa> (follow "FAQ" hyperlink; then follow "How is this section different from the rest of CNN.com?" hyperlink).

¹⁰⁶ *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

6. Jessica Alba
7. Naruto
8. Lindsay Lohan
9. Angelina Jolie
10. American Idol¹⁰⁷

The list accurately demonstrates the change in the nature of news and newsworthiness because 2008 was a presidential election year and yet Britney Spears and the World Wrestling Entertainment bested our current President.¹⁰⁸

Perhaps the Pulitzer Center on Crisis Reporting's YouTube presentation best illustrates the impossibility of defining news and hence newsworthiness in the era of ESI.¹⁰⁹ As part of an effort to determine what news is, the Pulitzer Center on Crisis Reporting asked journalists what they thought news was, and the responses varied widely from a more modern conception of news as, "anything that's interesting,"¹¹⁰ to a more patriarchal, traditional view defining news as "what people want to know and what people need to know."¹¹¹ However, what people want to know may differ from what people need to know, and it is the media's job to make that connection clear for the public.¹¹²

We were faced with two choices in determining the scope of the newsworthiness exception to privacy. One, allowing judges to decide what is newsworthy, is likely undemocratic and elitist.¹¹³ Or we can say newsworthiness is whatever the public is

¹⁰⁷ Yahoo.com, Top 10 Searches for 2008, available at <http://buzz.yahoo.com/yearinreview2008/> (last visited Jan. 5, 2010).

¹⁰⁸ *Id.* It should also be noted that "Britney" topped 2008 despite the fact this was a full two years after she took the internet by storm after being photographed drunk and sans underwear, sitting on the hood of a car. See Film.com, *Britney Spears' Naked Crotch has Lost its Magic*, Oct. 12, 2007, available at <http://www.film.com/features/story/britney-spears-naked-crotch-has/16862548> (last visited Jan. 5, 2010) (noting that the photographs in question were viewed over 100,000 times per day on the internet).

¹⁰⁹ Pulitzer Center on Crisis Reporting, *What is News?*, available at <http://www.youtube.com/watch?v=2U8Okb16okE> (last visited Jan. 5, 2010).

¹¹⁰ *Id.* (interview with Ellen Lee of the San Francisco Chronicle).

¹¹¹ *Id.* (interview with Antigone Barton of the Palm Beach Post).

¹¹² *Id.*

¹¹³ See e.g., Hall v. Post, 372 S.E.2d 711 (N.C. 1998) (demonstrating Justice Mitchell's view that, "the chilling effect is minimized if the question of whether the published material is of legitimate concern to the public is initially a question of law for the trial court."). However, the elitist nature of Justice Mitchell's view is exposed by Judge

interested in finding out about,¹¹⁴ thereby implying that all information is potentially newsworthy under the common law.¹¹⁵ The top searches on Yahoo and the statistics on internet usage indicate that we have chosen the latter.¹¹⁶

As a result, electronically-stored information and the associated exponential expansion of the newsworthiness privilege has at least necessitated or fostered a severe diminution of privacy in tort law. This decreased expectation in informational privacy is also illustrated by a very modern phenomenon, the voluntary relinquishment of informational privacy.

B. The Voluntary Relinquishment of Informational Privacy

"I just had a weird thought. Before Facebook and Twitter, people actually kept their personal lives to themselves."¹¹⁷ The quote illustrates that ESI and the internet permit the phenomenon of online social networking, which represents an unprecedented, broad societal demise in the concept of informa-

Baime's comments in *Yun v. Ford, Motor Co.*, who disagreed with a finding of proximate cause as a matter of law in a negligence case:

We judges are strange creatures. It is not that we are less brave than others, but rather by reason of our training, if not our nature, we tend to the conservative. For most of us, prudence and caution are the watchwords. We are rarely rewarded for taking risks. But the rest of the population does not always act the way we do. What may appear strange to judges might seem rather ordinary to others. It thus generally makes sense to have lay people, not judges, make decisions on the question of proximate cause, grounded as that concept is in considerations of foreseeability and fairness.

647 A.2d 841, 851 (1994) (Baime, J., concurring and dissenting).

At this juncture it seems as though a jury would be in a better position than a judge to determine newsworthiness. However, by the time the case gets to the jury the information we wished to keep private would have been disseminated in the interim.

¹¹⁵ Once information is on the net, and enough people are interested in viewing the information, it is newsworthy and hence no longer private under the common law. Note I say under the common law because certain statutes, such as the Health Insurance Portability and Accountability Act (HIPAA), mandate privacy and nondisclosure. One might violate HIPAA, which regulates the dissemination of medical records and other personal health information, and possibly not violate the common law if the information is that a Boy Scout leader has received therapy for child molestation.

¹¹⁶ See *infra* notes 100, 103.

¹¹⁷ George Sfarnas, *A Boy and His Blog*, BEING FIVE COMIC STRIP, available at <http://www.prunejuiccomics.com/beingfive/strips09/twitter.gif> (last visited Mar. 3, 2008).

tional privacy. Brad Paisley's song, *Online*,¹¹⁸ captures perfectly the societal relevance of online social networking sites (OSN's). Professor Patricia Sánchez Abril explains that:

[Online social networking] usually refers to websites whose main purpose is to act as a connector between users. The primary species of this cyber-genus is websites that facilitate communication via user-generated Web profiles that can include personal information, music, pictures, links, video clips, real-time transcripts of conversations, and often-colorful self-musings. . . .

For OSN participants, a web page or online profile constitutes their identity in cyberspace. Anyone with a valid e-mail address can create a profile. . . .

. . . .

. . . .What results is a digital combination of a billboard and a scrapbook; a résumé and a diary; a tabloid magazine and a family photo album; and a reality television show and a family video all rolled into one. As one commentator has described it:

If you can imagine having a club, a social club, where everybody walked around with a big sandwich board on the front of them saying everything about themselves, if you take that concept and take it to the Internet, something that's happening electronically across the world, not just in

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I work down at the pizza pit And I drive an old Hyundai
I still live with my mom and dad I'm 5'3 and overweight
I'm a Sci-Fi fanatic Mild asthmatic Never been to 2nd base
But there's a whole nother me That you need to see Go check out MySpace
'cause online I'm out in Hollywood I'm 6'5 and I look damn good
I drive a Maserati I'm a black belt in Karate And I love a good glass of wine
It turns girls on that I'm mysterious I tell 'em I don't want nothing serious
'cause even on a slow day I can have a three way Chat with two women at one time

I'm so much cooler online So much cooler online

Brad Paisley, *Online*

one little building, that's kind of what social networking does right now on the Internet.¹¹⁹

There are well over a hundred OSN sites considered major sites,¹²⁰ not including defunct sites. The two most popular sites in the United States are MySpace¹²¹ and Facebook.¹²² MySpace was founded in August 2003 and is now the third most visited website in the United States, the sixth most visited in the world, and an integral part of popular culture.¹²³ "By mid-2005, within two years of MySpace's debut as a social-networking site . . . MySpace was getting more page views than Google, and by early 2006, MySpace was welcoming around 200,000 new members a day."¹²⁴ As of February 16, 2009, MySpace claims about 130 million users worldwide.¹²⁵

Similarly, Facebook defines itself as "a social utility that connects people with friends and others who work, study and live around them. People use Facebook to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet."¹²⁶ It is now the largest online social network and worth approximately \$3.7 bil-

¹¹⁹ See Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 13-16 (2007).; see also Dana M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, J. OF COMPUTER-MEDIATED COMMUN (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (last visited Mar. 3, 2009) (defining social network sites as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.").

¹²⁰ Wikipedia, *List of Social Networking Sites*, available at http://en.wikipedia.org/wiki/List_of_social_networking_websites (last visited Sept. 13, 2009).

¹²¹ MySpace Home Page, <http://www.myspace.com>.

¹²² Facebook Home Page, <http://www.facebook.com>.

¹²³ Pedro de Gouveia, *The Four Most Popular Social Networking Sites*, BIZ COMMUNITY, available at <http://www.bizcommunity.com/Article/196/16/20623.html> (last visited Sept. 13, 2009).

¹²⁴ LARRY MAGID & ANNE COLLIER, *MYSPACE UNRAVELED* 11 (2007). More recent estimates put the figure as high as 230,000 new members per day. See Sánchez Abril, *supra* note 119, at 13.

¹²⁵ *Seeing Opportunity, Myspace Flexes Mobile Muscles*, ABC NEWS/TECHNOLOGY, available at <http://abcnews.go.com/Technology/wireStory?id=6893939> (last visited Jan. 5, 2010).

¹²⁶ Pedro de Gouveia, *The Four Most Popular Social Networking Sites*, BIZCOMMUNITY.com, available at <http://www.bizcommunity.com/Article/196/16/20623.html> (last visited Jan. 5, 2010).

lion.¹²⁷ As of February 2009, Facebook had 175 million users and was growing at the astounding rate of 5 million new users per week.¹²⁸ Additionally, 18-24 year-old users, the original intended audience of the site, now make up less than 25% of users as more “mature” people begin to engage in social networking.¹²⁹ Online social networking is not merely a modern recreational, social activity but it is important for the modern identity exploration “happening all over the world.”¹³⁰

The typical OSN profile or page may contain information about the user’s marital status, sexual orientation, hometown, religion, smoking habits, drinking habits, children, education, income, interests, music, movies, television, books, and other information, including photos of the user and friends and family¹³¹ or other information traditionally considered private.¹³² Unlike the Brad Paisley song referenced above, people involved in online social networking are revealing real and considerable personal or private information about themselves and not merely fictitious information.¹³³ For example, half of all blogs¹³⁴ discuss relationships such as boyfriends or girlfriends and peo-

¹²⁷ *Facebook Appraisal Pegs Company’s Value at \$3.7B*, ABC NEWS/TECHNOLOGY, available at <http://abcnews.go.com/Technology/wireStory?id=6859162> (last visited Jan. 5, 2010).

¹²⁸ Jessi Hempel, *How Facebook is Taking Over Our Lives*, CNNMoney.com, available at http://money.cnn.com/2009/02/16/technology/hempel_facebook.fortune/index.htm?postversion=2009021910 (last visited Jan. 5, 2010).

¹²⁹ *Id.*

¹³⁰ MAGID & COLLIER, *supra* note 124, at 11, 16.

¹³¹ *Id.* at 36-56; see also Sánchez Abril, *supra* note 119, at 5 (explaining the nature of the disclosures occurring via the web: “OSNs such as MySpace and Facebook host billions of interactions a day and facilitate the dissemination of personal information via combinations of audio, video, and text. Uninhibited users of these social technologies, sometimes referred to as digital natives or the MySpace generation, routinely post online titillating videos and photographs, disclose their personal information (and that of others), and document their daily lives and thoughts.”).

¹³² *Id.* at 16 (describing the content of OSN profiles or blogs as containing sordid details of personal lives).

¹³³ David Huffaker, *Teen Blogs Exposed: The Private Lives of Teens Made Public*, available at http://www.davehuffaker.com/papers/Huffaker-2006-AAAS-Teen_Blogs.pdf at 4 (last visited Jan. 5, 2010).

¹³⁴ “A blog (a contraction of the term ‘web log’) is a website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video.” Wikipedia, *Blog*, available at <http://en.wikipedia.org/wiki/Blogs> (last visited Mar. 4, 2008).

ple who the blogger has a crush on.¹³⁵ Sometimes the blogger displayed information about whom the blogger “hook[ed] up” or “ma[de] out with” and even included discussions of sexual experiences.¹³⁶

The internet is currently transitioning from a system of pre-arranged websites “to a second generation platform of social networking sites, communication tools, and web applications” or Web 2.0,¹³⁷ which is here to stay and we have little control over it.¹³⁸ Web 2.0 actually encourages the disclosure of private information which people are not otherwise comfortable giving out via other methods of communication. For example, bloggers often discuss their homosexuality, sometimes using the Web to “come out” even where immediate associates were not privy to the information.¹³⁹ There simply is no “real world parallel” or precedent for this type of disclosure.¹⁴⁰ As one researcher put it, traditionally, “You don’t go walking around the mall telling people whether you are straight or gay.”¹⁴¹

A recent study of 4000 Carnegie Mellon University college students revealed the following astonishing statistics regarding their Facebook profiles:

90.8% of profiles contain an image, 87.8% of users reveal their birth date, 39.9% list a phone number (including 28.8% of profiles that contain a cellphone number), and 50.8% list their current residence. The majority of users also disclose their dating preferences (male or female), current relationship status (single, married, or in a relationship), political views (from “very liberal” to “very conservative”), and various interests (including music, books, and movies). A large percentage of users (62.9%) that list a relationship status other than single even

¹³⁵ Huffaker, *supra* note 133, at 7.

¹³⁶ *Id.*

¹³⁷ Web Terminology Glossary, Web 2.0, available at <http://back40design.com/glossary/?letter=W> (last visited Jan. 5, 2010).

¹³⁸ MAGID & COLLIER, *supra* note 124, at 172 (indicating “Web 2.0 is not going away anytime soon, and it’s hardly something we can control.”).

¹³⁹ Huffaker, *supra* note 133, at 7.

¹⁴⁰ Alison George, *Living Online: The End of Privacy?*, NEW SCIENTIST TECH, available at <http://www.newscientist.com/article/mg19125691.700-living-online-the-end-of-privacy.html> (last visited Jan. 5, 2010).

¹⁴¹ *Id.*

identify their partner by name and/or link to their Facebook profile.¹⁴²

This comfort with disclosing what was formerly considered private information is a result of ESI and the “media environment they’ve grown up in.”¹⁴³ This environment leads to the belief that the more information people provide to their online profiles the more valuable the network becomes to them.¹⁴⁴ Furthermore, the fact that people are publishing unprecedented volumes of information online, that may be permanently accessible by web users, is changing the nature of personal privacy and even putting an end to the concept.¹⁴⁵ In fact, as people become more comfortable putting their personal information online, a shift in what we consider private could also occur.¹⁴⁶

A recent Pew study indicates “51% of under 30, home broadband users have posted content to the internet, compared with 36% of home high speed users older than 30.”¹⁴⁷ The transition to Web 2.0 and the associated voluntary relinquishment of privacy as a result of online social networking is sure to increase as the internet becomes accessible not only from homes but from mobile devices with broadband capability.¹⁴⁸

¹⁴² Ralph Gross & Allesandro Acquisiti, *Information Revelation and Privacy in Online Social Networks* 9, WORKSHOP ON PRIVACY IN THE ELECTRONIC SOCIETY (2005), available at <http://privacy.cs.cmu.edu/dataprivacy/projects/facebook/facebook1.pdf> (last visited Jan. 5, 2010).

¹⁴³ MAGID & COLLIER, *supra* note 124, at 22.

Consider the amazing time we live in. Paris Hilton is famous because she’s famous. . . . The idols of “American Idol” are instantly famous, and the show’s ratings suggest that everybody else should want to be famous, too. . . . There are plenty more reality TV shows that are all about exposing the intimate details of people’s lives-including “real” celebrities. . . . Kids are getting all these messages saying, “expose, expose, expose If you don’t your friends will expose you. . . . We’re all living in a superpublic environment, getting the message that you have more power if you expose yourself than if someone exposes you.

Id.

¹⁴⁴ George, *supra* note 140; see also Alexandro Dileonardo, *CMU Researches Facebook Privacy as Site Goes Global*, THE TARTAN, available at http://www.thetartan.org/2006/9/18/news/facebook_research (last visited Jan. 5, 2010).

¹⁴⁵ George, *supra* note 140.

¹⁴⁶ *Id.*

¹⁴⁷ MAGID & COLLIER, *supra* note 124, at 172.

¹⁴⁸ *Id.* at 11-12.

C. Possible Reasons for Informational Privacy's Normative Shift

1. Spatial Challenges of ESI

Research suggests changes in attitudes towards privacy of electronically-stored information and information in cyberspace relate to the conception that this information is somehow massive, untraceable, and unquantifiable.¹⁴⁹ Another possible reason is the world of electronically-stored information and cyberspace seems somehow artificial or unknown and unnamed,¹⁵⁰ such that there is a flawed assumption that cyber disclosure of private information cannot impact the "real" world.

Other hypotheses about changes in attitudes towards privacy are further reaching but provide a means to utilize the privacy paradigm shift to improve our civil justice system. The first of these theories relates to electronically-stored information's spatial indefiniteness.¹⁵¹ This directly relates to the changes in electronic discovery, especially in the area of preproduction-privilege review because as previously mentioned, before the incorporation of the computer and electronically-stored information, paper information was stored in a discrete space or, in the case of an attorney, in a discrete filing system with individual labels.¹⁵²

An attorney knew exactly where the file labeled "privileged" was in her office, and in response to a request for production, she would not send the specific box of documents containing privileged information, which was located in a discrete, physical space.¹⁵³ Part of the reason the information could be considered private is because it was stored or located in a discrete and tangible physical space which the attorney could identify and to which the attorney could prevent access.¹⁵⁴ In other words, for information to be private, a person has to have physical control

¹⁴⁹ Huffaker, *supra* note 133, at 10 ("the sheer size of the internet may produce a feeling of safety or anonymity" in the same way people often say it is easier to tell a stranger private information than an "acquaintance, family member or friend.").

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., Sánchez Abril, *supra* note 119, at 17-21.

¹⁵² See *infra* Part II.C. (describing document management in a paper world).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

and awareness of the space where the information resides. Access to that known space could then be denied.

Today electronic information is not similarly stored in a discrete and tangible physical space in the same sense as physical or paper-based information, but it is stored on a hard disk in a manner unrelated to our traditional concepts of physical space.¹⁵⁵ Today's attorney is simply unaware of the physical location of information sought in an electronic discovery request. It is likely stored, duplicated, and rearranged every time the magnetic storage medium containing it is accessed or retrieved.¹⁵⁶

Without this awareness of spatial location, the attorney has two choices: turn over no information or turn over all. Civil litigation and the discovery process prohibit the former but now actively encourage the latter.¹⁵⁷ Under traditional privacy conceptions, a person simply cannot claim a privacy right in information, the location of which they are unaware and therefore are unable to hide.

2. Flexible Morality

The second theory regarding ESI's impact on the decline in informational privacy relates to ESI's facilitation of both the dissemination of formerly private information and the disclosure of information traditionally considered private¹⁵⁸ and to privacy's historic use as a way to shield one's reputation from moral or ethical judgment.¹⁵⁹ As these ethical "norms" have shifted or been destroyed, the need to use privacy as a defense of

¹⁵⁵ See e.g., Sánchez Abril, *supra* note 119, at 17-21; see also Withers, *supra* note 39, at 8, 10-11 (discussing the unique custodianship issues of ESI as well as the difference in sorting paper discovery and electronic discovery).

¹⁵⁶ See *supra* Part II.A. (describing the mechanics of electronically-stored information).

¹⁵⁷ See *supra* Part II.B. (discussing the new rules electronic discovery paradigm favoring the sharing of information).

¹⁵⁸ See *supra* Part III.A. (demonstrating that the ease of dissemination of ESI is the basis for the expanding scope of the newsworthiness privilege); see also MAGID & COLLIER, *supra* note 124, at 22 (discussing incentives for people to share via the internet, information traditionally considered private).

¹⁵⁹ See Boyd, *supra* note 119.

one's reputation has decreased, and therefore more "typically private" information is revealed.

People often use privacy to defend their reputation from judgment and to control how they are viewed.¹⁶⁰ Judge Posner notes, "Privacy allows people to 'conceal information about themselves that others might use to their disadvantage'" or that causes them to be embarrassed.¹⁶¹ Dr. Alfred Kinsey first hinted at this in his study of sexual behavior wherein he concluded that the prevalence of what was considered deviant sexual behavior was so widespread that it in fact was the norm, and what was considered normal was really a fictional picture humanity painted of itself to avoid social embarrassment.¹⁶²

Today, highly esteemed public figures and institutions traditionally thought to represent the virtue of morality are caught in, "morally-condemnable" situations. For example:

- The Roman Catholic Church has fallen into disrepute because of the widespread allegations of sexual abuse by clergy.¹⁶³
- The most pious evangelical leaders have been caught up in scandals involving prostitution, sex, drugs and other things considered by society as immoral.¹⁶⁴
- The attorney general of New York, Elliot Spitzer, so long espoused as a paragon of virtue, was felled by a prostitution scandal.¹⁶⁵

¹⁶⁰ DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 34 (2007).

¹⁶¹ *Id.* at 35. Judge Posner, on his blog, has stated that people want to conceal facts that are "embarrassing or discreditable." He argues that people want to hide the embarrassing information about themselves that go against cultural taboos. *Id.* Gary Becker & Richard Posner, *The Becker-Posner Blog*, available at http://www.becker-posner-blog.com/archives/2005/05/posner_on_privacy.html (last visited Jan. 5, 2010).

¹⁶² Lawrence Kubie, M.D., *Psychiatric Implications of the Kinsey Report*, *PSYCHOSOMATIC MEDICINE: J. OF BEHAVIORAL MED.*, Oct. 2, 1995, at 1, available at <http://www.psychosomaticmedicine.org/cgi/reprint/10/2/95.pdf> (last visited Jan. 20, 2010).

¹⁶³ Cathy Lynn Grossman, *Faithful Endure Another Year of Scandal, Schism*, *USA TODAY*, Dec. 22, 2003, available at http://www.usatoday.com/news/religion/2003-12-22-religion-usat_x.htm (last visited Jan. 5, 2010).

¹⁶⁴ Wikipedia, *List of Christian Evangelist Scandals*, available at http://en.wikipedia.org/wiki/List_of_Christian_evangelist_scandals (last visited Jan. 20, 2010).

¹⁶⁵ Danny Hakim & William K. Rashbaum, *Spitzer is Linked to Prostitution Ring*, *N.Y. TIMES*, Mar. 10, 2008, available at

- Senator Condit was exposed as having an affair with an intern despite being married.¹⁶⁶
- Senator Larry Craig, a grandfather, pled guilty to disorderly conduct after being arrested for soliciting homosexual sex in a public bathroom.¹⁶⁷
- The Episcopal Church U.S.A. consecrated an openly, homosexual bishop.¹⁶⁸
- Celebrity actors and entertainers stage their comebacks based on drunk antics, DUI's, and stints in rehabilitation programs.¹⁶⁹
- Olympic gold medalist, Michael Phelps, was pictured using a bong, purportedly to smoke marijuana, at a party.¹⁷⁰

Comparing the political careers of Bill Clinton and Barack Obama provides an excellent illustration of society's rapidly changing attitudes toward morality and as a result privacy. In 1992, presidential candidate Bill Clinton "thought marijuana use could be enough of a liability [that he was] compelled to say he had not inhaled."¹⁷¹ Sixteen years later, President Obama, on the other hand, gained widespread acceptance from the youth by talking openly about his extensive previous drug use as a

<http://www.nytimes.com/2008/03/10/nyregion/10cnd-spitzer.html> (last visited Jan. 5, 2010).

¹⁶⁶ Dana Bash, *Senator Says She Urged Condit to Go Public*, CNN.COM, available at <http://archives.cnn.com/2001/US/07/10/condit.feinstein/index.html> (last visited Jan. 5, 2010).

¹⁶⁷ Dana Bash & Jessica Yellin, *Craig: I Did Nothing "Inappropriate" in Airport Bathroom*, CNN.COM, Aug. 28, 2007, available at <http://www.cnn.com/2007/POLITICS/08/28/craig.arrest/index.html> (last visited Jan. 5, 2010).

¹⁶⁸ Laurie Goodstein, *Openly Gay Man is Made Bishop*, N.Y. TIMES, Nov. 3, 2003, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C00E3D71130F930A35752C1A9659C8B63> (last visited Jan. 5, 2010).

¹⁶⁹ Liss Ross, *Rich, Fabulous, and Drunk: Celebrities and DUI's*, ASSOCIATED CONTENT, May 7, 2007, available at http://www.associatedcontent.com/article/231145/rich_fabulous_and_drunk_celebrities.html (last visited Jan. 5, 2010).

¹⁷⁰ *Sheriff Investigates Whether Michael Phelps Smoked Pot*, CNN.COM, Feb. 3, 2009, available at <http://www.cnn.com/2009/CRIME/02/03/sheriff.phelps.marijuana/> (last visited Jan. 17, 2010).

¹⁷¹ Lois Romano, *Effect of Obama's Candor Remains to be Seen*, WASHINGTON POST, Jan. 3, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/02/AR2007010201359.html> (last visited Jan. 5, 2010).

candidate, and is the first candidate to admit to the use of cocaine.¹⁷²

These events, in effect, encourage the disclosure of information usually held private for fear of moral condemnation by society. The easily disseminated nature of ESI increases public awareness of these moral realities. As society recognizes that the behaviors typically associated with a good reputation may be an unrealistic, unattainable ideal no longer worthy of protection, people divulge more information previously kept private to protect a "moral reputation."

The ESI catalyzed the decline in informational privacy, and the changing paradigm of information sharing, facilitated by the rules relating to electronic discovery and necessitated by changing societal norms, provides an opportunity for our civil legal system to borrow from the Continental system of civil justice and to be transformed from a system concerned only with resolution of disputes to one simultaneously concerned with both the discovery of material truth and dispute resolution.¹⁷³

IV. DECLINING PRIVACY AND AN IMPROVED CIVIL JUSTICE SYSTEM

A. Continental and American Justice Systems Compared

The major differences between the inquisitorial continental legal system, typified for example by Germany and France, and the American adversarial legal system may be summarized as follows. The American system is "characterized by a high degree of partisan behavior, party autonomy, judicial passivity and reliance on lawyers' integrity."¹⁷⁴ In stark contrast to the American adversarial system where truth is often subordinate¹⁷⁵ to

¹⁷² *Id.*

¹⁷³ See *supra* Part IV.C.

¹⁷⁴ Law Reform Commission of Western Australia, *Advantages and Disadvantages of the Adversarial System in Civil Proceedings*, available at <http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-2civiladvers.pdf> (last visited Jan. 5, 2010) [hereinafter *Advantages and Disadvantages*].

¹⁷⁵ THEODORE L. KUBICEK, ADVERSARIAL JUSTICE AMERICA'S COURT SYSTEM ON TRIAL 37-45 (describing the subordination of truth in the criminal justice system with arguments equally applicable to the civil justice system).

privacy,¹⁷⁶ is the Continental or inquisitorial system, where resolution of disputes is not party driven before a neutral and passive judge but involves an inquiry conducted by the court which is not confined to submissions of the opponents.¹⁷⁷ In this setting, there are theoretically no restrictions on fact-finding activity¹⁷⁸ and no presentation of partisan evidence or of facts; rather, the judge determines facts, interrogates witnesses, formulates issues, and renders a decision.¹⁷⁹ The continental system therefore involves the judge as an active participant undertaking an "uninhibited search for the truth."¹⁸⁰

The adversarial justice system is often criticized because resolution is often at the expense of truth, resolution is slow, and party control of litigation mixed with the requirement of zealous advocacy leads to distrust in the factual development because parties are likely to present only evidence buttressing their position.¹⁸¹

Additionally, the American system has been criticized for allowing only the wealthy effective court access.¹⁸² Contributing to the high cost of litigation to parties is the cost of discovery and pretrial fact gathering in an adversarial system.¹⁸³ Discovery in civil trials is subject to abuse and in fact, despite its original aims of promoting fact finding in hopes of a more efficient resolution, there is evidence that discovery is the most inefficient and expensive way to obtain information for trial.¹⁸⁴

Yet discovery as opposed to trial remains essential to the resolution of disputes in the civil system since only two percent of civil actions are now resolved at trial.¹⁸⁵ In fact, one British

¹⁷⁶ SCALLY, *supra* note 9, at 2 (describing the struggle between the search for truth and respecting privacy and freedom from humiliation and abuse).

¹⁷⁷ *Advantages and Disadvantages*, *supra* note 174, at 25.

¹⁷⁸ SCALLY, *supra* note 9, at 4.

¹⁷⁹ *Id.* at 4-6.

¹⁸⁰ *Id.* at 4.

¹⁸¹ LANDSMAN, *supra* note 16, at 24-33.

¹⁸² *Id.* at 30.

¹⁸³ *Advantages and Disadvantages*, *supra* note 174 at 34 (discussing a finding by the Judicial Conference of the U.S.).

¹⁸⁴ KUBICEK, *supra* note 175, at 107.

¹⁸⁵ See Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, available at <http://www.judicialaccountability.org/articles/nomoredayincourt.htm> (last visited Jan. 5,

lawyer observing the American justice system commented, "An American is incapable of handling a case without discovery and deposition. Discovery is his shower and deposition is his breakfast."¹⁸⁶ Even if the normative expectation of inquisitorial justice, the discovery of truth, is actually achieved, Americans would still reject this idea of justice for the following reasons.

B. American Obstacles to Implementing Inquisitorial Justice

At the core of adversarial justice is the belief that party control of litigation affirms human individuality¹⁸⁷ and prevents tyranny and state overreaching.¹⁸⁸ Additionally, the adversarial nature of pretrial discovery is a reflection of many core American values including, individualism, egalitarianism, laissez-faire, populism, and anti-statism.¹⁸⁹

The adversarial system of justice also reflects American distrust in concentrated power and the belief that a neutral judge would not apply the same zeal to discovery in "ferreting" out the positives of their cases and the negatives of their opponent's.¹⁹⁰ In contrast, "Continental civil procedure '[graciously tolerates] incompleteness of evidentiary material' [and] the protagonist who tends to monopolize fact gathering—the judge—is not

2010). In this article, the author describes the phenomenon of the rarity of trials in litigated matters, explaining:

In reality, according to a new study, trials have become quite uncommon. In 1962, the study says, 11.5 percent of all civil cases in federal court went to trial. By [2002], that number had dropped to 1.8 percent. And even though there are five times as many lawsuits today, the raw number of civil trials has dropped, too. They peaked in 1985 at 12,529. Last year, 4,569 civil cases were tried in federal court.

Id.; see also KERMIT HALL & KEVIN MCGUIRE, *THE JUDICIAL BRANCH* 325 (2005).

¹⁸⁶ Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 292 (2002) (internal citation omitted).

¹⁸⁷ LANDSMAN, *supra* note 16, at 35.

¹⁸⁸ *Id.* at 35-36; see also *Advantages and Disadvantages*, *supra* note 174, at 28 (demonstrating the existence of the argument that the adversarial system provides a restraint on state power).

¹⁸⁹ Chase, *supra* note 186, at 292-96.

¹⁹⁰ See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 309 (2002).

really very energetic or resolute in his probing.”¹⁹¹ On the other hand, the adversarial system utilizes the power and motivation of self interest to develop the proofs.¹⁹² Of course, “the supposed efficiency of the adversarial system in fact finding and high quality legal argument is itself crucially dependent upon each side being able to fund a lawyer or legal team to roughly the same extent, and upon each side’s lawyer being competent, expeditious, and ethical.”¹⁹³

The reality is however, public perception of the fairness of the adversarial system is less than stellar because the public is acutely aware that more money tends to buy more competent, zealous and ethical lawyers.¹⁹⁴ The belief that the adversarial system is effective in preventing the concentration of power is also questionable because wealthy corporations are able to concentrate as much power as some nation states.¹⁹⁵ Ironically, the average person may not be able to challenge this corporate concentration of legal power and resources without assistance from the state.¹⁹⁶

Realistically, in the American system there are not nearly enough judges to replace adversarial parties and their lawyers as the principal investigators and developers of facts and evidence.¹⁹⁷ Another related reason the continental system may not be appropriate is the argument commonly put forth that the adversarial system is cheaper since there is no large state judiciary to fund.¹⁹⁸ However this argument is due to “creative accounting” since the cost of the adversarial system is not necessarily lower, but borne by the parties instead of society as a whole.¹⁹⁹

¹⁹¹ *Id.* at 309-10 (citation omitted); see also *Advantages and Disadvantages*, *supra* note 174, at 25 (discussing that this may be an illusory benefit in terms of the adversarial system).

¹⁹² *Advantages and Disadvantages*, *supra* note 174, at 25.

¹⁹³ *Id.* at 27.

¹⁹⁴ KUBICEK, *supra* note 175, at 63-65; see also *Advantages and Disadvantages*, *supra* note 174, at 28.

¹⁹⁵ KUBICEK, *supra* note 175, at 63-65.

¹⁹⁶ *Id.*

¹⁹⁷ See Subrin, *supra* note 190, at 309.

¹⁹⁸ *Advantages and Disadvantages*, *supra* note 174, at 25.

¹⁹⁹ *Id.* at 27.

C. The Hybrid Afforded by ESI and Reduced Privacy

The rules regarding electronic discovery and changes in the nature of privacy now provide us the opportunity to marry this laudable continental goal of truth seeking with the adversarial process while retaining the American values which are inapposite to the inquisitorial system of justice. By exploring the full potential of Federal Rule of Evidence 502(d) and shifts in privacy paradigms, a discovery model which is cheaper, more efficient, and geared simultaneously towards truth seeking and adversarial justice emerges.

As more and more new documents are being stored electronically, the norm in discovery will be the discovery of electronically-stored information which requires the observed shift in the traditional discovery paradigm.²⁰⁰ The sharing of information, first thought of as a necessary evil in some of the early cases, confronted with the uniqueness of discovery of ESI, has now been codified in Federal Rule of Evidence 502(d).²⁰¹ This, as previously mentioned, is a decline in the recognition of zones of informational privacy.²⁰² This decline in privacy in the discovery arena is further reflective of a decline in society's notions of informational privacy as well.²⁰³

Extrapolating the change in privacy further to a society where magnetic storage of information is the sole data storage methodology and informational privacy becomes a thing of the past, these "anomalies" in discovery and changes in privacy will become the norm rather than the exception. Already today, in electronic discovery, parties are given access to all of the other party's information because the cost of preproduction-document review is so high in the electronic storage age.²⁰⁴

Whether we openly admit that this alters or obliterates informational privacy zones or we pretend it does not and rubber stamp "privileged" on a document already viewed by opposing party but deemed not admissible in evidence because it is sub-

²⁰⁰ See *supra* Part II.B.

²⁰¹ See *supra* Part II.B.

²⁰² See *supra* Part II.B.

²⁰³ See *supra* Part IV.B.

²⁰⁴ See *supra* Part II.B.

sequently described as privileged pursuant to Rule 502(d) is really unimportant. Either way, the information is no longer unknown or unknowable to the opposing party and asking people to unlearn information is unrealistic.²⁰⁵ Couple this with the rapid societal decline in the notion of private information and a new model of civil litigation emerges where the truth will be there for all parties to discover freely.

Instead of expending litigation capital on using privacy to inhibit access to facts and to limit the facts available for consideration, the principal role of the lawyer will be to search, sort, and arrange the massive data field consisting entirely of ESI and available to all parties. Each adversary would, as in the present system, apply the evidentiary rules to argue certain facts within the factual universe, now accessible by all parties, are not *reliable* enough to be admissible at trial. The difference in the hybrid system is that all "knowable" facts or truths would be available for consideration by all parties to the dispute.

Once the parties in a dispute take a formal adversarial posture, the opinion work product doctrine would prevent any subsequent litigation strategies by the lawyer from remaining secret. In other words, the legal theories and strategies of the attorney would remain private, but, the facts upon which those theories are based would be knowable to all. In a way, this resembles the current appellate system where parties apply legal theory to a known set of facts, the record. Interestingly, the appellate system is considered a corrective mechanism for an error-prone adversarial trial mechanism.²⁰⁶

In this regard, the attorney-client privilege would be rendered obsolete to the extent it protected factual information, but to the extent the attorney communicated with the client about litigation strategy or his thoughts regarding the same, this would overlap with the protection of the work product doctrine. The notion of doing away with a factual attorney-client privilege is not as radical as it seems. Modern scholarship challenges the

²⁰⁵ See Daniel, *supra* note 54, at 682.

²⁰⁶ See LANDSMAN, *supra* note 16, at 19 (discussing the development of appellate procedures in the adversarial system).

normative assumptions regarding established Wigmorean rationales about the privilege and confidentiality.²⁰⁷

Academics believe, "privilege encouraged clients to provide complete, accurate information to their counselors so that the lawyers could represent their clients competently."²⁰⁸ Justification for this privilege assumes without privilege or confidentiality the client would not disclose the information to the attorney and therefore the information would never have come to light, resulting in an evidentiary "wash" and no net harm to the justice system.²⁰⁹ However, empirical studies show Wigmore's behavioral assumptions to be overgeneralizations²¹⁰ and current applications of privilege actually result in the suppression of highly relevant evidence and hence to unjust litigation outcomes.²¹¹

The continental system is also criticized because even though the search for the truth is unhindered by the notion of privacy zones and partial presentation of facts, the judge, as part of a bureaucracy, is lazy and unmotivated to seek the truth.²¹² The adversarial process and self interest will ensure the fervent search for the truth among the openly available facts but, as in the inquisitorial system, there would be no limit on access to dispositive facts. As a result, the role of the lawyer

²⁰⁷ See, e.g., Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 156-62 (2004).

²⁰⁸ Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS, 477, 481-82 (2002).

²⁰⁹ See Imwinkelried, *supra* note 207, at 154.

[T]he privilege would protect only . . . statements that would not otherwise have been made." Even in the imperfect world he lived in, Wigmore believed that if the courts rigorously applied his criteria, in the vast majority of cases the privileges would suppress only statements which would not have been uttered but for the assurance of confidentiality they furnish. Wigmore thought that there would be a "wash"—the justice system would not be in a worse net position when the trial judge enforced the privilege to exclude evidence because in most instances, absent the privilege the evidence would never have come into existence.

²¹⁰ See Imwinkelried, *supra* note 207, at 182.

²¹¹ *Id.* (explaining the application of privilege law has been "bought at the price of justice.")

²¹² See Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. JUR. COMP. L. 839, 843 (1997).

will no longer be primarily concerned with developing the factual universe but will shift to effectively exploring and mining it. Once the factual truth is revealed by fervent adversarial mining of the open factual universe, the role of the lawyer will be to adversarially research and apply the law to achieve the most favorable outcome for her client. Again, the adversarial process alleviates traditional American concerns about a lack of zeal in inquisitorial justice.²¹³

Furthermore, concerns of state involvement are mitigated because the judges in this new system would be no more involved in the process than they currently are in the adversarial model. In fact, they may be less involved in litigation because most of the disputes in litigation are about discovery and which facts are admissible and which facts are protected as private information.²¹⁴ In a system where access to facts is unimpeded, all disputes regarding access to facts are rendered obsolete.

The hybrid system also negates the concern that availability of truth in the continental system requires an increase in the size of the judiciary thereby alleviating any concerns about the concentration of authority in the state, typical of the continental adversarial system.²¹⁵ In the hybrid system, retained adversarial processes would result in truth being discovered even more effectively than the continental system, while simultaneously protecting the societal values reflected by the adversarial system.²¹⁶ In fact, this new role of the lawyer would be closer to the role originally envisioned for lawyers; persons who possessed a

²¹³ See *supra* Part IV.B.

²¹⁴ Institute for the Advancement of the American Legal System, University of Denver, *Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, Aug. 1, 2008, available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650 (last visited Jan. 5, 2010) [hereinafter *Trial Lawyers Task Force*] (explaining that factual access is typically the most important part of litigation); see also *infra* Part I (demonstrating that discovery or the search for facts is a balance between the search for truth and recognition of informational privacy).

²¹⁵ *Advantages and Disadvantages*, *supra* note 174, at 28.

²¹⁶ See Subrin, *supra* note 190, at 309 (discussing the continental system's notoriety for inertia and laziness in fact discovery). Additionally, combining the adversarial and continental systems is not too much of a stretch. Modern continental systems tend to have adversarial properties as well. See, e.g., Damaska, *supra* note 212, at 840.

set of unique skills to be used for the resolution of societies' disputes.²¹⁷ To a large extent, discovery changed the role of the lawyer from a "trial lawyer" to a "litigator."²¹⁸

The new paradigm of discovery and informational privacy would also make more sense in terms of ethics.²¹⁹ It would negate many of the ethical conflicts caused by the normative tension between three competing ethical considerations; zeal,²²⁰ confidentiality,²²¹ and candor.²²² At least one scholar thinks the mandates of the ethical rules are unfair in asking the lawyer to simultaneously be, a "champion in forensic roughhouse and a guardian of the temple of justice."²²³

More concretely, there is a potential for conflict between the electronic discovery paradigms, their associated preproduction access to information, and the confidentiality requirements of Model Rule of Professional Conduct 1.6 which states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent"²²⁴ That potential for conflict is greatly overstated however. The model rule is not violated if the lawyer obtains informed consent for disclosure of the otherwise confidential information.²²⁵

In the cases involving electronic discovery, lawyers should not have trouble obtaining informed consent. The lawyer would simply explain to the client that he would be happy to conduct the preproduction-privilege review to avoid giving the adversary everything. However, the fees associated with preproduction-privilege review of the massive computer storage system would

²¹⁷ See Russel G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995).

²¹⁸ Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 484-85 (1995).

²¹⁹ Scholarly argument abounds that complying with ethical principles of the rules may be an antiquated pipedream. See, e.g., *id.* at 503. Even if we concede the ethical rules are the lawyer's equivalent of the fictional antebellum south they remain very relevant to the practice of law and this article discusses conforming with them.

²²⁰ See MODEL RULE OF PROF'L CONDUCT R. 1.3 cmt.1 (2004).

²²¹ MODEL RULE OF PROF'L CONDUCT R. 1.6 (2004).

²²² MODEL RULE OF PROF'L CONDUCT R. 3.1 (2004).

²²³ See LANDSMAN, *supra* note 16, at 204.

²²⁴ MODEL RULE OF PROF'L CONDUCT R. 1.6(a) (2004).

²²⁵ *Id.*

be excessive and timely, and the client would be responsible for this fee. The lawyer would then inform the client that another option exists. Both sides could provide to each other all the information, subject to a claim of privilege being asserted later on. The confidentiality would be gone but the privilege and work product protection would still be available from an evidentiary standpoint.²²⁶ In all likelihood, the reality of the expense would lead to the client's informed consent. This waiver of confidentiality in the age of electronic discovery and diminished privacy, may be the only way to allow cost effective litigation.²²⁷

Currently, a significant portion of the conflict about the limits of confidentiality, zeal, candor, and privacy occurs in discovery as lawyers fail to disclose witnesses, evidence and documents or try to swamp the opposing side with frivolous discovery requests all in the name of controlling the factual universe of the litigation.²²⁸ Under current discovery norms, the aim of the lawyers in discovery is to control the facts available for consideration in a dispute by not disclosing pursuant to an asserted privilege or to compel disclosure via a motion to compel discovery or disclosure.²²⁹

The current sanctions framework for violation of disclosure or discovery encourages this frivolity because, absent a motion by opposing counsel, the court may only sanction a party for failing to disclose by preventing the party from using, "that information or witness to supply evidence on a motion, at a hearing, or at a trial"²³⁰ The sanction seems almost to encourage the nondisclosure since a party would happily be barred from using a witness it did not disclose because they felt the information or witness was harmful to them. The Supreme Court openly recognizes "the common lament that the success of judicial su-

²²⁶ Sedona Conference, *supra* note 55, at 54:34-55:40.

²²⁷ See *supra* Part II.A-B (discussing the prohibitive cost of e-discovery under the paper discovery paradigm).

²²⁸ See Conrad J. Jacoby, *E-Discovery Update: My E-Discovery Holiday Wish List*, LLRX, Dec. 14, 2008, available at <http://www.llrx.com/columns/ediscoverywishlist.htm> (last visited Jan. 5, 2010) (indicating fact discovery is responsible for 70% of all litigation costs).

²²⁹ See *supra* Part I.D (discussing the motion practice associated with protective orders and motions to compel discovery).

²³⁰ FED. R. CIV. P. 37(c)(1).

pervision in checking discovery abuse has been on the modest side.”²³¹

More severe sanctions are only possible after a motion is filed and a hearing had.²³² My own practice experience and conversation with members of the judiciary indicates, however, that discovery sanctions are in reality a measure of last resort because the discovery rules contemplate extrajudicial resolution of discovery disputes.²³³ This belief is unrealistic in a system where discovery’s importance is such that the major role of the lawyer is not typically to prepare for trial but to adversarially control the facts available to the tribunal and opposing counsel.

Most cases settle, and victory is not in the scathing cross [examination], but in the tedious review of documents. Success is in the details, the expertly drafted interrogatories or request for records, and in the ingenious strategy to obtain the statement allegedly protected by privilege. For it is Discovery which we do. The motions, the papers the depositions. This is the numbing ditch digging work that determines the winner.²³⁴

There is no denying that “[t]he discovery system is in fact broken. Discovery costs too much and has become an end in itself.”²³⁵

In a world where access to factual information is available to all, the role of the lawyer would no longer be one of a forensic, fact-finding roughhouse, but the lawyer would then concentrate on becoming a skilled strategist whose major function would be to zealously and skillfully apply and distinguish cases based on a set of facts knowable by all parties. This role would be more amenable to the compliance with current rules of professional conduct because the ethical principles embodied in those rules find their empirical basis in a view of the legal profession where

²³¹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

²³² FED. R. CIV. P. 37(c)(1)(A-C).

²³³ See FED. R. CIV. P. 26(c)(1) & 37(a)(1) (mandating parties certify they have tried in good faith to resolve the issues before filing motions for protective orders and to compel discovery respectively).

²³⁴ See Subrin, *supra* note 190, at 299-300. My colleagues practicing in federal court comment they have had to take some cases to trial that they otherwise would not just so they would remember how to try cases.

²³⁵ See *Trial Lawyers Task Force*, *supra* note 214.

the lawyer was not a detective whose skill at searching for the facts earned him his living, but a uniquely noble person whose primary goal was resolution and problem-solving for broad societal benefit based on a unique skill set he possessed.²³⁶

In addition to all being generally modeled on an outdated paradigm,²³⁷ the vagueness of ethical rules regarding candor and duty to the tribunal currently allows lawyers to rely on their practical indeterminacy while giving weight to the more specific rules relating to client interest, such as zeal and confidentiality.²³⁸ Natural offshoots of this imbalance are a winning-is-everything attitude and abuse of discovery to withhold factual information during the discovery process in the interest of their client.²³⁹ The resulting unjust outcomes embody the problems of current adversarial civil justice and illustrate the need for reformation of informational privacy or privilege.²⁴⁰

Professor Lasso hoped that the 1995 amendments to the Federal Rules of Civil Procedure, which mandated disclosure, would force lawyers to reexamine their roles as adversaries and as a result, solve the aforementioned problems associated with

²³⁶ See, Pearce, *supra* note 217, at 1231. The author discusses this issue, stating:

Created in the late nineteenth century in response to rising concerns that entrepreneurial aspects of law were undermining the profession's reputation, the Professionalism Paradigm rests on a purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy. The conditions that made this bargain possible and necessary all require distinguishing a profession from a business. Under the paradigm, lawyers differ from businesspersons in that they possess esoteric knowledge inaccessible to lay persons. The paradigm also holds that, in contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest. The combination of inaccessible knowledge and altruism makes both impractical and unnecessary the outside regulation of public and market to which businesses are subject.

Id.

²³⁷ See *id.*

²³⁸ *Advantages and Disadvantages*, *supra* note 174, at 39.

²³⁹ See Lasso, *supra* note 218, at 481 (discussing the winning-is-everything mentality of the adversarial system); see also *id.* at 485 (describing discovery as "time consuming, inefficient and unfair dispute resolution" such that there is "unanimous demand for discovery reform").

²⁴⁰ See Imwinkelried, *supra* note 207, at 182.

discovery.²⁴¹ However, his hopes did not come to pass as the same complaints about discovery remain pervasive.²⁴²

Perhaps one reason the disclosure requirements did not result in the anticipated improvements in the discovery system is that it left lawyers with little incentive to disclose because of the weak sanction structure regarding failure to disclose.²⁴³ Another reason is the inherent and core beliefs that adversarial justice has to be, well, adversarial and that anything helping the adversary is unethical.²⁴⁴

The electronic discovery rules are different from the disclosure rules in that the lawyer has no choice but to share information in electronic discovery cases since ESI renders searching his own client's factual database for facts that were traditionally suppressed in discovery as "private," too expensive and unfeasible.²⁴⁵ If lawyers want to litigate in the age of electronically-stored information, they must engage in the sharing of information involved in the quick-peek and clawback agreements encouraged by the 2006 amendments to the Federal Rules of Civil Procedure and the enactment of Federal Rule of Evidence 502(d).²⁴⁶

The real magnitude of the sharing required by electronic discovery, despite Rule 502(d)'s allowance for reasserting privacy after disclosure, only becomes apparent by recognizing that an opponent who learns information simply cannot unlearn it,

²⁴¹ See Lasso, *supra* note 218, at 526.

²⁴² See *Trial Lawyers Task Force*, *supra* note 214.

²⁴³ See *supra* notes 214-15 and accompanying text.

²⁴⁴ See Lasso, *supra* note 218, at 481. Lasso responds to reading the new 1995 disclosure amendments to the Federal Rules of Civil Procedure, explaining:

When I first read the new rules' requirement that a party automatically disclose information previously required only upon a formal discovery request, I had some trepidation about such a radical departure from established practice. Voluntary disclosure of information that might expose the faultlines in a client's case seemed at first like high treason. Voluntary disclosures also seemed antithetical to the adversary process because, by providing a level field in discovery battles, they diminish the advantage that a cunning lawyer might have over a less gifted opponent.

Id.

²⁴⁵ See *supra* Part II.A-B (discussing the change necessitated by the storage and discovery of electronically stored information).

²⁴⁶ See *supra* Part II.B (discussing the effect of the amendments to Fed. R. Civ. P. 26 and the enactment of Fed. R. Evid. 502).

and that an adversary who learns of the information during electronic discovery can use it in litigation despite formalistic claims of confidentiality, privilege, or protection.²⁴⁷

Rule 502(d) and electronic discovery may be the beginning of a broader change related to informational privacy. In the not-too-distant future as we become comfortable accepting the reality that informational privacy is impossible and irrelevant in a spaceless, Facebook-driven world, the nature of the discovery process, and hence the adversarial system of justice, will be modified.²⁴⁸

Conflicts between zeal and factual candor to the tribunal would also be reduced if all factual information became available to all parties. The only remaining conflict between zeal and candor would be the attorney's failure to reveal legal authority directly adverse to his client's position.²⁴⁹ This however is a minimal conflict because the rule only requires revelation of legal authority which is "directly adverse."²⁵⁰ Any lawyer, especially one freed from the rigors of fact discovery, could easily distinguish the authority such that it is not "directly adverse."²⁵¹ Additionally, whether it is because factual information is currently protected by up to three privacy doctrines, under an adversarial regime it is more acceptable to hold each of the parties responsible for finding their own law since its availability is not something the opposing party could monopolize as in the case of facts.

Imagine the role of the lawyer in a world where discovery is about being able to manage and apply the information comprising the entire truth rather than one where it is about obtaining that information. The changes in discovery regarding ESI

²⁴⁷ See *supra* Part II.C (discussing the real impact of clawback and quick-peek agreements on privacy and confidentiality).

²⁴⁸ See *supra* Part III.C (explaining the reasons for the rapid and substantial decline in informational privacy necessitated by the advent of ESI).

²⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2008). Additionally, under an adversarial regime it is more acceptable to hold each of the parties responsible for finding their own law since its availability is not something the opposing party could have a monopoly on as in the case of facts.

²⁵⁰ *Id.*

²⁵¹ A single factual discrepancy between the adverse authority and the lawyer's case renders the adverse authority "indirect."

represents a broader societal change and quite possibly a re-definition of human creativity, as we transition from a world where access to information is valuable to one where efficient use of readily accessible information is the next skillful commodity. These radical changes related to information accessibility have already been noted for many years in the corporate sector and in economic theory as the contribution of information to GNP continues to rise,²⁵² and as new economic models develop to deal with this shift.²⁵³

Some might argue that the justice system proposed by this article glosses over the distinction between different types of informational privacy. For example, corporations may not be as casual or comfortable with the decline in informational privacy, especially as it relates to trade secrets. The easy answer is that this piece presents a system akin to the concept of economic efficiency, in that it represents a utopian perfection which even though it might be unattainable, we should still strive for. However, corporate comfort with informational privacy is no different than the choice some people make today to avoid the online social networking phenomenon.

The decision for a corporation really is a balancing of the costs and benefits of not storing trade secrets electronically versus storing and distributing information electronically to gain a vast competitive advantage.²⁵⁴ Trade secrets, however, are anomalous because any minimal advantage gained by storing this type of information electronically is dwarfed by the benefits of ensuring privacy by not storing this information electronically. For example, as far as Kentucky Fried Chicken is concerned, the process is deliberately archaic:

The recipe has been stashed at the company headquarters for decades, and for more than 20 years has been tucked away in a filing cabinet equipped with two combination locks. To reach the cabinet, the keepers of the recipe would first open up a vault and unlock three locks on a door that stood in front of the

²⁵² See, e.g., PHILIP EVANS, BLOWN TO BITS: HOW THE NEW ECONOMICS OF INFORMATION TRANSFORMS STRATEGY 11 (2000) (discussing generally the shift in the corporate model as we shift into an information dominated economy).

²⁵³ *Id.* at 15-17.

²⁵⁴ *Id.* at 11-14.

cabinet. Vials of the herbs and spices are also stored in the secret filing cabinet. "The smell is overwhelming when you open it," said one of two keepers of the recipe in an interview at company headquarters. The biggest prize, though, is a *single sheet of notebook paper, yellowed by age, that lays out the entire formula — including exact amounts for each ingredient — written in pencil and signed by Sanders.*²⁵⁵

In corporate America, electronic networks are already being replaced by networks considered open or accessible by entire industries. As this continues, information flows more freely increasing everyone's transparency.²⁵⁶ The legal reality of coming decades will be based on the realization that since access to information in a world of declining privacy is symmetrical, there will be no need for control of information as is currently the norm.²⁵⁷

CONCLUSION

The radical changes discussed by this piece should be read in light of the following: Forty-two years from now at the middle of the century anyone over forty years old and reading this piece will likely be dead.²⁵⁸ Also dead will be the model of informational privacy that the deceased group espoused. Forty-two years in terms of internet usage and privacy norms is an eternity considering that Facebook was launched in February 2004 and now has about 175 million members, adding users at the rate of 5 million per week.²⁵⁹

The civil justice system is in need of major repair.²⁶⁰ More precisely, the discovery system is broken.²⁶¹ The new amendments to the civil discovery rules do not fix the problem but

²⁵⁵ *KFC Shoring Up Security for Secret Recipe*, USA TODAY, Sept. 9, 2008, available at http://www.usatoday.com/news/nation/2008-09-09-kfc-recipe_N.htm (last visited Mar. 6, 2009) (emphasis added).

²⁵⁶ EVANS, *supra* note 252, at 30, 218.

²⁵⁷ *Id.* at 218.

²⁵⁸ *See Life Expectancy in USA Increases to 77.6 Years; Deaths from Heart Disease, Cancer Decline, Report Finds*, MEDICAL NEWS TODAY, Mar. 3, 2005), available at <http://www.medicalnewstoday.com/articles/20557.php> (last visited Jan. 17, 2010).

²⁵⁹ *See supra* note 129 and accompanying text.

²⁶⁰ *See, generally*, KUBICEK, *supra* note 175.

²⁶¹ *See Trial Lawyers Task Force*, *supra* note 214.

merely tinker around the edges.²⁶² Asking participants in today's business model of litigation to comply with ethical rules of a bygone era is akin to asking the modern military to fight with clubs.²⁶³

Repairing the civil justice system requires recognizing the paradigm shifts in informational privacy and adjusting the litigation model to suit. In so doing, much of the expense of litigation currently attributed to fact-finding would diminish. People are simply more comfortable with information about themselves being known. In today's world of ESI and internet, application of factual knowledge rather than obtaining factual knowledge is the valuable commodity. The need for the attorney-client privilege and ethical confidentiality is questionable if the demise in informational privacy is extrapolated to the not too distant future.

The legal profession should embrace this societal shift and expand the information-sharing model created by Federal Rule of Evidence 502(d) and the 2006 amendments to the Federal Rules of Civil Procedure. The potential result is a civil justice system which remains appealing to the public, operates within workable ethical parameters, and permits the search for truth while maintaining the safeguards of adversarial justice.

²⁶² *Id.*

²⁶³ See, Pearce, *supra* note 217, at 1231 (indicating that the rules of ethics are outdated and of limited utility). Similarly, fighting a modern military battle with the weapons of prehistory is an exercise in futility.



PROFITS ABOVE THE LAW: CHINA'S MELAMINE TAINTED MILK INCIDENT

Chenglin Liu*

INTRODUCTION

On May 1, 2008, Yi Kaixuan, a five-month-old boy, died in the Gansu Province of China.¹ His mother collapsed in grief several times and suffered insomnia and rapid weight loss. His father, to avoid being reminded of the sudden loss, burned almost every trace of baby Kaixuan's existence, from photos to clothes to birth footprints.² The child's family agonized without knowing what actually caused Kaixuan's death until four months later. From the news, the family learned that Sanlu baby formula, which the family had fed Kaixuan since his birth, had been tainted with melamine. It was melamine, an industrial substance used for making plastics, which caused Kaixuan to suffer serious kidney stones leading to his painful death.³

The melamine contamination was by no means an accident. The World Health Organization (WHO) confirmed reports from China that milk suppliers deliberately added melamine to di-

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¹ There are several reports about Yi Kaixuan's death both in China and abroad. See, e.g., Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1; Edward Wong, *China Recalls More Milk Items for Testing*, N. Y. TIMES, Oct. 15, 2008, at A8; Ng Tze-wei, *Frustration Over Lawsuits in Milk Scandal, Courts Slow to Respond to Cases*, S. CHINA MORNING POST, Oct. 14, 2008, at 8; Cara Anna, *China's Milk Scandal Leads Family to Sorrow and a Rare Lawsuit*, THE VIRGINIAN-PILOT & LEDGER-STAR, Oct. 14, 2008, at A3; Chen Zhong and Xiao Lu, *Quanguo Shouli Sanlu Naifen Zhisi Yinger Jiashu Suopei Baiwan [Parents Filed a Lawsuit Seeking One Million Yuan in Damages for the Death of Their Son]*, CAIJING [CAIJING MAGAZINE], Oct. 15, 2008.

² Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1.

³ *Id.*

luted milk in order to deceive quality control review.⁴ In further production, milk processors only checked protein levels by measuring nitrogen concentration. As a nitrogen-rich crystalline compound, the addition of melamine increased the nitrogen content and made the adulterated milk appear rich in protein.⁵ To make matters worse, some reports alleged that milk processors also added melamine to already contaminated milk in order to cut costs and increase revenue.⁶

According to official estimates, at least six babies had died and nearly 300,000 were sickened from drinking the tainted milk.⁷ As of January 12, 2009, "more than 300 children remained hospitalized for treatment."⁸ Even worse, for the children who recovered from kidney damage, doctors are unsure whether they will suffer further complications when they grow older.⁹

As the world's largest exporter of consumer goods, the volume of Chinese exports exceeds \$1 trillion annually.¹⁰ The im-

⁴ World Health Organization, Questions and Answers on Melamine, *available at* <http://www.who.int/csr/media/faq/QAmelamine/en/print.html> (last visited Aug. 29, 2009).

⁵ *Id.*

⁶ See David Barboza, *Squeezed by Milk Scandal, China's Dairy Farmers Say They are Victims*, N.Y. TIMES, Oct. 4, 2008, at A5; see also Julie R. Ingelfinger, *Melamine and the Global Implications of Food Contamination*, NEW ENG. J. MED., Dec. 25, 2008, at 2746 ("Before the current melamine disaster, the marked dilution of infant formula in China had resulted in marasmus in some infants, which led to government directives to increase the protein content of such preparations or risk severe penalties. Thus, it is possible that the adulteration was conceived in response to a well-intentioned government directive.").

⁷ Weishengbu: Woguo Gong 29 Wan Yinger Miniao Xitong Yin Shi Wenti Naifen Chuxian Yichang [The Ministry of Health: Over 290,000 Infants Suffered Urinary Abnormalities from Drinking the Tainted Milk], XINHUA NET, Dec. 1, 2008; see also Will Clem & Lilian Zhang, *Tainted Milk Feared to Have Killed Another Baby*, S. CHINA MORNING POST, Jan. 9, 2009, at 5.

⁸ Loretta Chao, *Victims of Tainted Milk File Lawsuit in China's High Court*, WALL ST. J., Jan. 20, 2009, at A10.

⁹ Ingelfinger, *supra* note 6, at 2748 ("The bottom line, however, is that nobody knows the true extent of the present epidemic or the risks to come. No more deaths have been reported since the Chinese government and the international public health community became aware of the problem. Yet the long-term health effects remain unknown.").

¹⁰ Joseph Kahn, *China Quick To Execute Drug Official*, N.Y. TIMES, July 10, 2007, at C1; see also David Barboza, *Big Recalls Don't Slow Exports from China*, N.Y. TIMES, Oct. 13, 2007, at C1.

pact of the milk scandal went far beyond mainland China.¹¹ The scandal prompted a number of Asian countries¹² and the European Union to ban food products from China.¹³ The U.S. Food and Drug Administration recalled products containing ingredients made in China.¹⁴ The milk scandal further demonstrated the Chinese government's continued failure to adequately regulate its food and drug industry even after previous scandals involving lead-tainted toys, toxic toothpaste, and melamine-laced pet foods.¹⁵ These commercial disasters have resulted in a serious loss of confidence in Chinese-made products worldwide.

The tainted milk scandal should not have been a surprise to either the Chinese government or the public because similar product safety scandals had occurred several times before. In 2004, more than 200 infants in China suffered so called "big head" syndrome due to malnutrition, and at least twelve died, after consuming formula that contained no nutrients.¹⁶ In response, the Chinese government repeatedly expressed concerns about food safety and took action to dismiss responsible officials and overhaul its antiquated food safety regulatory regime. The government sought quality control measures not only due to enormous public pressure but also to restore the shattered public image of Chinese exports, an image critical to China's economic growth which depends heavily upon international trade. To show the world its sincerity about improving the safety of

¹¹ Du Naifen Fengbo Fanwai Kuoda Wushi Duo Guo Ji Jinkou Huo Shouhui Han Shanju Qingan Zhongguo Zhi Shipin [*The Milk Scandal Widened, Over Fifty Countries Imposed Import Ban or Recalled Chinese Made Food Products*], SING. MORNING NEWS, Oct. 5, 2008. Two weeks after the news broke, Hong Kong health authorities confirmed that a three-year-old baby girl was treated for kidney stones after drinking Yili, a famous baby formula brand from China. *Id.* A lingering fear of contamination led a number of Asian countries, including Indonesia, the Philippines, Japan and Korea, to either step up inspection or ban dairy products from China. *Id.*

¹² *Id.*

¹³ *EU Bans Baby Food with Chinese Milk*, ST. LOUIS POST-DISPATCH, Sept. 26, 2008, at A11.

¹⁴ Larry Smith, *Chinese Candy Tainted with Melamine Found in Connecticut*, THE VIRGINIAN-PILOT & LEDGER-STAR, Oct. 2, 2008, at A5.

¹⁵ David Barboza, *China Moves to Refurbish a Damaged Global Image*, N.Y. TIMES, July 29, 2007, at A6.

¹⁶ Jim Yardley, *Infants in Chinese City Starve on Protein-Short Formula*, N.Y. TIMES, May 5, 2004, at A3; see also Fuyang Naifen Shijian Jiben Chaqing [*Preliminary Report on Fuyang Milk Scandal*], RENMIN RIBO HAIWAI BAN [PEOPLE'S DAILY, OVERSEAS ED.], May 17, 2004 at 1.

Chinese made products, the People's Court executed Mr. Zheng Xiaoyu, the former Food and Drug Administration chief in 2007, for taking bribes to approve untested medicine known to have caused death.¹⁷ In August 2008, Mr. Wu, the head of food production supervision at the General Administration of Quality Supervision, Inspection and Quarantine, committed suicide after prosecutors questioned him about his large sum of unexplainable assets.¹⁸ It appeared that the Chinese government had made genuine efforts to fix the scandal-ridden quality control regime. The outbreak of tainted milk, however, proved that these efforts were less than fully effective.

This paper considers China's food safety regulatory regime and the fundamental flaws that permeate both its supervision system and governing laws. Part I examines the market structure in the dairy industry and how the government failed to regulate the chaotic market that forced competitors to externalize costs and resulted in the inevitable milk scandal. Part II addresses how the Sanlu Group and local government concealed the scandal for fear of bad publicity and loss of profits. Part III examines the measures that the Chinese government took in response to this scandal and previous crises. The paper argues that the government should search for a new direction—both in law and policy, because its traditional, paternalistic, top-down style of supervision has failed repeatedly. The paper also argues that the present system does little to prevent the dairy industry from pursuing profits at the expense of consumer welfare, and that the government should regulate the market towards inducing milk processors to internalize the cost of doing business. Furthermore, much could be achieved by consumer participation in product safety issues through private litigation.

¹⁷ David Barboza, *Questions Swirl After Death of China's Food Safety Chief*, N.Y. TIMES, Aug. 14, 2008, at C4.

¹⁸ *Zhijian Zhongju Shipinsi Sizhang Shexian Jingji An Zisha* [Quality Supervision Bureau Food Department Director Committed Suicide], MEIRI JINGJI XINWEN [THE DAILY ECON. NEWS], Oct. 13, 2008.

I. MARKET STRUCTURE, COMPETITION AND PRODUCT QUALITY

With increasing domestic demand for milk products, China's dairy industry grew rapidly in the mid 2000's. Approximately 1600 dairy processing firms emerged, 95% of which were small or medium-sized companies.¹⁹ Even though China's dairy industry became highly fragmented,²⁰ six large milk processors dominated the majority of distribution. According to Babcock Research Institute, the companies Mengniu, Yili, and Bright Dairy accounted for about 42% of China's dairy product sales in 2005. Combined with Sanlu and two other firms, the Big 6 accounted for over 50% of the fresh milk market in China.²¹ The competition among the Big 6 was fierce.²² Yet, the news reported that melamine had been found in dairy products from twenty-two milk processors, the worst offender being Sanlu. Thus the scandal was not just about a particular milk processor, it reflected a serious quality problem deeply entrenched in China's entire dairy industry.

In theory, market competition serves as a vital force to motivate enterprises towards enhancing consumer welfare.²³ This concept, however, has seemingly had little positive impact on the Chinese milk market. While the milk industry market grew to be highly competitive after the conversion from government to private control in the 1990's, the scandal revealed that, in fact, competition delivered lower quality products to Chinese consumers. Contrary to popular wisdom, some scholars have attributed the scandal to the furious competition in the unregu-

¹⁹ William D. Dobson, *Drivers of Change in China's Dairy Industry—Implications for the U.S. and World Dairy Industries*, BABCOCK INSTITUTE DISCUSSION PAPER NO. 2006-4 14 (2006).

²⁰ Wang Zhigang et al., *Chinese Consumer Demand for Food Safety Attributes in Milk Products*, 33 FOOD POLICY 27, 28 (2008).

²¹ Dobson, *supra* note 19, at 14.

²² *Id.*

²³ LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 12 (Thomson West 2d ed. 2006) ("If there is universal agreement on one antitrust goal, it is that antitrust should strive for the *efficient allocation of society's available goods and services*. One of the costs of monopoly is the loss to consumers that would have purchased the monopolized product or service at a competitive price," but forego the purchase because of monopoly surcharge. (emphasis added)).

lated milk industry.²⁴ To better understand the problem, it is necessary to consider how China's dairy industry and market developed.

A. Demand and Supply of Dairy Products in China

1. Growing Demand

Traditionally, most people in China did not include milk in their diet. Even today, "China has one of the lowest annual per capita consumption rates [of milk] in the world."²⁵ The lack of milk consumption persists primarily because of "low income in rural areas, lack of familiarity with dairy products, and lactose intolerance."²⁶ Yet, milk consumption has dramatically increased over time.²⁷

As the economy in China rapidly grew, the government looked for ways to stimulate domestic consumption because experts warned that China must vitalize domestic markets in order to achieve sustainable growth.²⁸ With increasing income and awareness of the nutritional aspects of food, many ordinary Chinese gradually changed their lifestyle to incorporate dairy products into their diet. Seizing the opportunity, both the central and local governments have vigorously promoted milk consumption. During his tour of a dairy factory, Premier Wen Jiabao famously proclaimed, "I have a dream that every Chinese, especially children, could drink one *jin* [two cups] of milk a day."²⁹ Towards this goal, and drawing on experience from Japan and Korea, the Chinese government instituted a school milk program. Despite the program's intended coverage of only 1% of

²⁴ Gong Qing, *Diaocha Hebei Naiyuan Luanxiang* [Investigation Report on the Chaotic Raw Milk Market in Hebei], CAIJING [CAIJING MAGAZINE], Sept. 21, 2008.

²⁵ Dobson, *supra* note 19, at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Chen Zhiwu, *Zhongguo Jingji Moshi Zhuanxing de Tiaozhan* [Challenges for the Transition of the Chinese Economic Model], Investor Participation Network, July 7, 2009, available at http://www.aordo.org/html/social_impact/2009-7/21/20090721201332.html. (last visited Jan. 9, 2010).

²⁹ Wen Jiabao, "Rang Meige Haizi Meitian Neng He Shang Yijin Nai." [Premier Wen Jiabao, "I have a dream that every child in China would drink a pound of milk each day."], CHONGQING CHENBAO, Apr. 25, 2006.

the 240 million elementary and middle school students,³⁰ it tremendously expanded milk consumption. By focusing on the young generation, the government's expectation has been to ingrain this lifestyle choice at an early age so that into adulthood ordinary Chinese will likely regard dairy products as indispensable.

Urbanization has also contributed to the increase of dairy product consumption. As economic growth expanded, supermarket chains such as French-based Carrefour extended their presence into midsized and small cities in China.³¹ Domestic national supermarkets followed suit. Unlike traditional convenience stores, the supermarket chains invested heavily in refrigeration systems that made it possible to market fresh milk on a regular basis. Additionally, the appetite for fresh milk grew rapidly because an increasing number of consumers owned refrigerators at home.³² More consumers in remote regions were also able to enjoy milk because of Ultra High Temperature (UHT) processing technology that has extended milk shelf life up to nine months.³³

Branded milk advertising has also had an impact. Just a few months before the scandal broke, Sanlu secured a high profile advertising agreement with the China Space Program, in which Sanlu became the sole milk provider for Taikonauts (Chinese astronauts).³⁴ Like Sanlu, other milk producers heavily invested in television commercials that featured athletes, pop stars, scholars, physicians, and government officials who promoted their respective dairy products. According to a survey conducted in 2001, "93% of the sample reported seeing television advertisements for milk products and 73% had seen billboards

³⁰ Dong Jun, *Xuesheng Nai Yuan Shengji Jihua Qidong, Rang Haizi He Zuihao de Niunai* [School Milk Plan Launched to Ensure Children Drink High Quality Milk], XINHUA NEWS, May 26, 2005.

³¹ David Barboza, *The Bold Struggle For China's Belly*, N.Y. TIMES, Mar. 6, 2003, at C1.

³² Frank Fuller et al., *Got Milk? The Rapid Rise of China's Dairy Sector and its Future Prospects*, 31 FOOD POLICY 201, 204-05 (2006).

³³ *Id.*

³⁴ *Sanlu Zhu Zhongguo Hangtian Yuan Taikong Aoxiang* [Sanlu Milk Helps Taikonauts Fly in Space], Sina Caijing [SINA FINANCE], Aug. 1, 2008. The deal was widely ridiculed by internet commentators. *Id.*

with dairy ads.”³⁵ The milk propaganda was effective especially among young generations who were more prone to the influence of commercials and likely to adopt a western-style diet.³⁶

2. The Sanlu Model and the Supply of Dairy Products

Prior to its debacle, Sanlu was a prominent publicly held company whose annual sales exceeded RMB 10 billion Yuan (U.S. \$1.4 billion).³⁷ Based in Shijiazhuang City, Hebei Province, Sanlu originally developed as a collectively-owned enterprise from a small dairy farm with only a few dairy cattle.³⁸ During the economic reform in the 1990's, Sanlu was transformed into a separate entity, even though the local government retained the power to appoint the CEO and fill other important posts in the corporation.³⁹ In time, Sanlu became the undisputed leader in China's dairy processing industry, especially after the Fonterra Group of New Zealand, one of the world's biggest dairy exporters, purchased a 43% stake in it.⁴⁰ For fourteen years up to the scandal, Sanlu was the largest producer of milk powder, the second largest producer of yogurt, and the fourth largest producer of fresh milk. Sanlu won numerous prestigious awards for best quality.⁴¹ Sanlu was not only one of the most trusted brands, in terms of safety, but was also perceived as a socially responsible enterprise. Shortly after the earthquake in Sichuan Province in May 2008, Sanlu donated RMB 8.8 million Yuan (U.S. \$1.2 million) worth of baby formula

³⁵ Fuller, *supra* note 32, at 204.

³⁶ *Id.*

³⁷ Zhang Dongdong, *Wei Fei Lixing Chengzhang Fuchu Chenzhong Daijia Zhongguo Ruye Tong Ding Si Tong* [Serious Consequences of Irrational Growth, Lessons Learned from the Milk Scandal], IFENG FIN. NEWS, Oct. 17, 2008.

³⁸ For the development of the Sanlu Group, see Tian Wenhua, *Sanlu Jituan Ziben Yunzuo de Shijian yu Renshi* [On Sanlu's Operation], 2 ZHONGGUO GONGXIAO SHANGYE RUYE DAOKAN [CHINA RETAIL J.-DAIRY INDUSTRY ED.] (2006).

³⁹ For more information regarding the relationship between local government and enterprises in China, see section C.2 below.

⁴⁰ Yao Xiaochen, *Shijie Yuye Jutou Heng Tian Ran Cangu Sanlu Ruye* [Fonterra Invested 800 Million Yuan in Sanlu], RENMIN WANG [PEOPLE'S DAILY NET], Dec. 1, 2005.

⁴¹ *Id.*

to quake victims.⁴² Most notably, Sanlu's business model had a great influence on other milk processors.

In contrast to the dairy industry in western countries, milk processors in China have not maintained large dairy farms for their milk supply. Scholars characterized China's milk industry as "milk processors + milk collecting stations + family based dairy farms."⁴³ In other words, milk processors have heavily relied on small family-run dairy farms to provide raw milk collected by independent milk stations. The three players transacted only on an ambiguous contractual basis, providing each the means to easily default on their obligations to the others.⁴⁴ In fact, China's milk processors functioned as a huge middleman between family farmers and consumers. The separation of milk processors and milk providers directly resulted from economic reforms by the government, which promoted separation of ownership and management.⁴⁵

Sanlu was the first milk processor to implement the separation model, often referred to as the Sanlu model (i.e. "sending cows to villages and bringing milk back to town"). In 1987, Ms. Tian, the former Chairwoman and General Manager of Sanlu, put 2000 dairy cows up for sale or rent. Through outsourcing its dairy farms, Sanlu saved 100 million Yuan (\$70 million) annually in feed costs. The customary practice evolved whereby individual farmers raised cows in their backyards and milked them at so-called "milk collecting stations" maintained by independent operators. These operators in turn transported raw milk back to Sanlu for processing. This method seemed to work well by enabling local farmers to increase their income, through raising and milking cows, and local governments to consequently increase tax revenues from the dairy farmers. Ms. Tian touted

⁴² *Sanlu Xiang Wenchuan Dizhen Zaiqu Zhaijuan 880 Wan Yuan Yinger Naifen* [Sanlu Once Again Donated 88 Million Yuan Worth of Baby Formula], XINLONG CAIJING, May 19, 2008.

⁴³ DOU MING MASTER ET AL., THE RESEARCH REPORT ON THE DEVELOPMENT OF THE DAIRY INDUSTRY IN CHINA § 5.1 (Beijing Orient Dairy Consultants 2006) (for Albert R. Mann Library of Cornell University).

⁴⁴ Qing, *supra* note 24.

⁴⁵ Zhou Yubo, *Guoyou Qiye Gaige Lifa Huigu Yu Zhanwang* [Review of the Reform on Legislation Regarding State Owned Enterprise], XUEXI SHIBAO [STUDY TIMES], July 14, 2008.

that the Sanlu model completely revolutionized the milk industry, benefiting both local farmers and governments while at the same time dramatically reducing production costs for processors.⁴⁶

Competitors across the country quickly copied the Sanlu model and outsourced their respective dairy bases.⁴⁷ The China Dairy Statistical Yearbook 2003 revealed family-based dairy farms raised roughly 75% of the 86.87 million dairy cows across China.⁴⁸ As a result, on average, a dairy farm owned only 3-5 cows in 2003,⁴⁹ despite the fact that the major dairy processors had promised to establish a concentrated milk supply.⁵⁰ By the time the Sanlu scandal broke out, more than 80% of raw milk for processing came from individual farmers.⁵¹ The Sanlu model contributed to further fragmentation of milk supply sources.

In a sheer accounting sense, the Sanlu model was indeed efficient because it externalized the costs which otherwise would have been born by the processors.⁵² The model, however, posed serious challenges for milk safety, because milk processors had no control over the quality of animal feed, health problems of dairy cattle, or hygiene conditions in the milk stations.⁵³ Unfortunately, these problems, including the addition of melamine to boost protein counts, eventually led to the demise of Sanlu. Prior to 2005, Sanlu held a monopoly in Hebei Province,⁵⁴ so both dairy farmers and milk stations had no choice but to follow Sanlu's guidelines on milk quality. Yet, even though the quality checks would not have revealed the overuse of antibiotics or ex-

⁴⁶ Baidu Baike, *Sanlu Jianjie* [Brief Introduction to Sanlu Co.], available at <http://baike.baidu.com/view/182041.htm> (last visited Dec.14, 2009).

⁴⁷ *Id.*

⁴⁸ Jing Yang, T. Gordon MacAulay, and Wenhua Shen, *The Dairy Industry in China: An Analysis of Supply, Demand and Policy Issues*, at 10, 48th Annual Conference of the Australian Agriculture and Resource Economic Society, Feb. 11-13, 2004, Melbourne, Australia, available at http://www.aares.info/files/2004_yang.pdf (last visited Dec. 16, 2009). "According to the Chinese Dairy Statistical Yearbook 2003, there were 6.87 million head of dairy cows by the end of 2002. The dairy cows raised by farm households accounted for 75 percent of the total, with each having 3-5 animals on average." *Id.*

⁴⁹ *Id.*

⁵⁰ Qing, *supra* note 24.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

cessive growth hormone, they did for a time prevent farmers from adding fatal chemical substances to raw milk.⁵⁵

B. "Racing to the Bottom": Competition and Quality

1. Competition for Raw Milk

In 2005, Big 6 milk processors made substantial investments in upgrading processing equipment, either through foreign investors or subsidies from local governments.⁵⁶ The increased milk processing capacity made the firms desperate to find additional milk supplies. While the big milk processors clearly knew that the real solution to inadequate supply was to maintain large scale dairy farms of their own, none of them wanted to incur the cost of doing so for fear of being undercut by other firms. Without effective state regulation to check the quality of milk, all the big firms were courting milk providers by lowering quality standards.⁵⁷ Consequently, big firms entered the Hebei raw milk market. As a result, Sanlu could no longer leverage a monopoly over dairy farmers and milk stations that had supplied Sanlu for about a decade. Because the contractual relationships between Sanlu and raw milk providers were not strictly enforced, the suppliers frequently switched to other processing firms that promised higher prices and less rigid quality checks.⁵⁸ The competition for milk supplies was so furious that big processors knowingly collected substandard raw milk. Mr. Wang Yuliang, a Sanlu marketing manager testified at trial that Sanlu could not afford to refuse substandard raw milk even though it knew the milk was laced with melamine.⁵⁹ The reason, according to Mr. Wang was that if Sanlu had refused the tainted milk, it would have certainly lost sources of supply permanently, because other firms would take the milk anyway.⁶⁰

⁵⁵ *Id.*

⁵⁶ Fuller, *supra* note 32, at 211.

⁵⁷ Qing, *supra* note 24.

⁵⁸ *Id.*

⁵⁹ Ye Tieqiao, *Gongsu Jiguan Pulu Sanlu Yinman Shishi Zhi Dunai Wailiu* [Sanlu's Cover-Up Caused Poisonous Milk to Enter the Market], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 1, 2009.

⁶⁰ *Id.*

2. Quality Exemption, Inferior Products and the "Prisoner's Dilemma"

Inferior milk quality can also be attributed to lack of government oversight.⁶¹ In 1999, the government established a quality exemption system in the *Decision of the State Council Concerning Several Issues on Further Strengthening Product Quality Work*.⁶² Critics blamed the exemption system for the milk scandal.⁶³ According to Article 16 of the decision, the government would grant quality exemption status to three kinds of products: (1) products with stable quality for a long time and a high market share rate; (2) products measuring up to or exceeding relevant state standards, and (3) products qualified in three consecutive selective inspections conducted by the quality and technical supervision department.⁶⁴ Products that bore inspection-exempted marks were not subject to any regional inspections.⁶⁵

Even though the government claimed that the exemption system was to ensure product safety, its real purpose was to promote a national market and curb problems with local protectionism.⁶⁶ At the time the exemption system was contemplated, regional rivals that produced the same products divided markets along provincial border lines.⁶⁷ In order to protect regional markets, local governments enacted various rules to make non-local goods more expensive.⁶⁸ Regional quality checks were among the measures to fend off competitors. The government believed that the exemption system would facilitate free flow of

⁶¹ *Id.*

⁶² Guowuyuan Guanyu Jin Yibu Jiaqiang Chanpin Zhilian Gongzuo Ruogan Wenti de Juding [Decision of the State Council Concerning Several Issues on Further Strengthening Product Quality Work], Guowuyuan Wenjian Guofa 24 [State Council Document No. 24], (1999), Art. 16. Notice of the General Office of the State Council on Abolishing the Food Quality Inspection-Free Provisions, State Council Document Guofa 110 (2008).

⁶³ Xiao Tong, *Quxiao Mianjian Zhidu Shifou Shifao Hui Fuhuo Difangbaohu* [The Repeal of Quality Inspection System is Feared to Revive Local Protectionism], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Oct. 10, 2008.

⁶⁴ See Guowuyuan *supra* note 62.

⁶⁵ *Id.*

⁶⁶ See Xiao, *supra* note 63.

⁶⁷ *Id.*

⁶⁸ *Id.*

goods across provincial borders and eliminate local measures to set up trade barriers.⁶⁹

The exemption system contributed to reducing costs for large enterprises, however, it inevitably left a loophole for quality control.⁷⁰ Taking quality standards into their own hands, large firms repeatedly lowered quality standards in order to improve cost efficiency.⁷¹ Article 16 also subjected firms who failed to comply with state standards to serious punishment, a provision rarely invoked before the milk scandal.⁷² The irony was that with a firm being granted exemption status, who would bother to conduct inspections? As long as consumers did not suffer immediate serious injuries, the exempted firms would enjoy their preferential status for an indefinite period of time.⁷³

Studies have shown that “[a]s [new] firms enter the market, they reduce the incentives of existing firms to produce high quality goods and also are more likely to introduce low quality goods.”⁷⁴ The predicament of the Big 6 milk processors in the Chinese dairy market was, in effect, a live version of the classic “prisoner’s dilemma.”⁷⁵ While knowing that maintaining its own dairy farm was the only way to increase milk safety, no processor was willing to be the first one to incur that cost. Realistically, whoever first invested in building dairy farms would be

⁶⁹ *Id.*

⁷⁰ Yu Mansheng, *Sanlu Shijian “Kaowen” Guojia Shipin Mianjian Zhidu [Sanlu Scandal Tested the Quality Inspection Exemption System]*, NANFANG DAILY NET, Sept. 17, 2008.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Yu Mensheng, *Mianjian Zhidu Feichu Youzhi Mingpai Chanpin Buneng Yilao Yongyi, [The Abolition of Quality Inspection Exemption System Ends the Limitless Privilege Enjoyed by Famous Brands]*, XIHUA NEWS, Mar. 6, 2009.

⁷⁴ Limor Golan, Christine A. Parlour & Uday Rajan, *Racing to the Bottom: Competition and Quality* 17 (Nov. 7, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028375 (last visited Jan. 9, 2010).

⁷⁵ JEFFREY L. HARRISON, *LAW AND ECONOMICS IN A NUTSHELL* 40-41 (Thomson West 4th ed. 2007) (“The problem involves two prisoners who are being held apart from each other after being arrested in connection with a crime. Separately they are questioned. If both prisoners confess they will receive sentences of five years. If neither confesses they will receive sentences of two years. Finally, if one confesses and the other does not, the confessor will be given a one year sentence and the prisoner choosing not to confess will be sentenced to 10 years. Without cooperation, each party will assume that the other will act selfishly and try to save his own skin. The result will be that each will confess and receive a sentence of five years.”).

undercut by the competitors who invested proceeds in other critical necessities, such as upgrading processing equipment, courting individual raw milk providers and expanding distribution chains. Since the government granted all of the six processors quality exemption status,⁷⁶ no one had any incentive to enforce rigorous quality control when they collected raw milk from individual dairy farmers through milk stations.⁷⁷ In other words, milk processors who strived to increase raw milk quality would likely lose ground in the raw milk market to other competitors. As a result, consumers who had limited knowledge and control in the milk market were the victims of furious competition. In such an unregulated market, the milk scandal was inevitable.⁷⁸

II. THE SANLU GROUP AND THE TAINTED MILK SCANDAL

A. Sanlu's Cover-up

On September 17, 2008, the police arrested Sanlu's former Board Chairwoman and general manager, Ms. Tian Wenhua, and other managers in response to the scandal.⁷⁹ The criminal trial of Ms. Tian and her associates received immense attention from the media both at home and abroad. Through testimony at trial, the story of how Sanlu concealed information about the tainted milk gradually came to light.⁸⁰

As early as December 2007, Sanlu had received a number of consumer complaints from parents who found a red substance in their babies' urine, after feeding them Sanlu formula, and about some babies who were hospitalized.⁸¹ Sanlu apparently gave no serious attention to the problem until March 2008, when a flood of consumer complaints claimed that its formula had caused

⁷⁶ Qing, *supra* note 24.

⁷⁷ *Id.*

⁷⁸ Zhang, *supra* note 37.

⁷⁹ Yang Shouyong & Dong Zhiyong, *Sanlu Jituan Dongshi Zhang Tian Wanhua Bei Xingshi Juliu* [Ms. Tian Wenhua, the Chairwoman of the Sanlu Group Arrested], XINHUA NEWS, Sept. 17, 2008.

⁸⁰ Ye, *supra* note 59. To date, this article is the most detailed report on Sanlu's cover up.

⁸¹ *Id.*

babies to suffer urinary and kidney diseases.⁸² Ms. Tian then ordered a special inspection team to look into the matter. A month later, the inspection team confirmed that Sanlu baby formula contained high levels of “non-protein nitrogen,” up to six times that of competing products. Ms. Tian began to suspect that the so-called “non-protein nitrogen” stemmed from melamine, the same chemical involved in the 2007 pet food scandal in the United States.⁸³

Realizing the seriousness of the situation, Ms. Tian and other managers decided to send samples of formula to several outside agencies for further inspection.⁸⁴ On July 24, 2008, Sanlu sent sixteen batches of baby formula to the Hebei Frontier Inspection and Quarantine Bureau (HFIQB).⁸⁵ All of the samples were submitted under fake brand names in order to conceal their true identity. The level of melamine found in fifteen samples shocked HFIQB officers, who later testified that the tainted milk would cause serious health problems even in animals.⁸⁶

By the time the HFIQB’s findings confirmed Ms. Tian’s suspicion, further complaints had overwhelmed Sanlu.⁸⁷ A great number of children had been hospitalized and there was one reported death. On the night of August 1, 2008, Ms. Tian called for an urgent executive meeting, which included marketing managers. Board directors from New Zealand’s Fonterra Group proposed issuing an instant recall of the products, but many Sanlu managers refused because they believed that a recall would seriously damage Sanlu’s reputation.⁸⁸ During the meeting, the managers passed two resolutions:⁸⁹ first, Sanlu would quietly replace the tainted formula with new product, instead of

⁸² *Id.*; see also Bannian Qian Jiuyou Tousu Sanlu Yinman Bubao [Sanlu Covered Up Consumer Complaints Filed Six Months Before the Scandal Broke Out], CHENGDU SHANGBAO, Sept. 14, 2008.

⁸³ Ye, *supra* note 59.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; see also David Barboza, *Former Executive Pleads Guilty in China Milk Scandal*, N.Y. TIMES, Jan. 1, 2009, at A10.

⁸⁹ Ye, *supra* note 59.

issuing an open recall; and second, all participants would strictly keep the information secret, to avoid a leak of embarrassing information during the imminent Beijing Olympics (held August 8–24, 2008). Furthermore, at the meeting it was decided that references to melamine would be coded as “Substance A” in order to ensure secrecy.⁹⁰

In hindsight, not issuing a recall had devastating consequences. However, even if Sanlu had successfully carried out its quiet replacement plan, it would have still saved many children from sickness and several others from dying. Unfortunately, this plan did not succeed. In the beginning, Sanlu did take some potentially beneficial actions. For example, Mr. Hang, a department manager, sent contaminated raw milk to another Sanlu department to make yogurt, probably because they believed that most yogurt consumers were adults who might not be as vulnerable as infants to the damage of melamine.⁹¹ A few days after the urgent meeting, however, Sanlu found it impossible to replace all the tainted formula with qualified products, especially with the dramatically increased demand for milk on the eve of the Mid-Autumn festival and the National Holiday. Sanlu simply did not have enough appropriate substitutes.⁹²

On August 13, 2008, Ms. Tian called another urgent meeting to discuss whether Sanlu should continue to sell the baby formula, which all of the managers clearly knew contained a high level of melamine.⁹³ Referencing a European standard that allegedly allowed up to twenty milligrams of melamine per kilogram in food products, the managers decided to release the products with a relatively lower level of melamine under a self-imposed standard of fifteen milligrams.⁹⁴ Even then, Sanlu could not enforce its self-imposed standard because of the record high demand for its products. From August 2 to September 12, 2008, Sanlu produced 904 tons of baby formula tainted with

⁹⁰ *Id.* Mr. Wang, a department manager, later testified that melamine was referred to as “Substance A” in all of the internal documents after the urgent meeting. *Id.*

⁹¹ *Id.*

⁹² See Wang Huishi, *Sanlu Yinman Zhenxiang Dongshi Zhang Bei Mianzhi* [Sanlu Covered Up the Tainted Milk, the Chairwoman of the Board Dismissed], SING. LIANHE ZHAOBAO, Sept. 17, 2008.

⁹³ Ye, *supra* note 59.

⁹⁴ *Id.*

high levels of melamine in 72 batches, and sold 69 batches, representing a total of 813 tons for 47,560,000 Yuan (U.S \$6.8 million). According to the *New York Times*, “in September, some Sanlu products were found to have over 2,000 milligrams of melamine per kilogram.”⁹⁵

When the police detained Ms. Tian and three other managers on September 17, 2008, they were charged with producing and selling fake or substandard products and producing and selling poisonous food in violation of the Criminal Law of China.⁹⁶ At trial, however, the public prosecutor dropped the latter charge, which carried the possibility of the death penalty. Experts believed that the prosecutor did so because pursuing the death penalty would require meeting a higher burden of proof. Disappointed with the prosecutor’s move, some commentators insisted that the managers should be executed.⁹⁷

At trial Ms. Tian admitted that she and other Sanlu managers deliberately concealed information about the melamine tainted products.⁹⁸ Faced with mounting evidence, the defense lawyers nevertheless made the following arguments in support of Ms. Tian: First, the relevant laws and regulations did not prohibit the use of melamine, therefore, Sanlu did not have an obligation to check melamine content.⁹⁹ Second, Sanlu did not have the requisite intent to add melamine to its milk products because the milk collectors and raw milk producers were the

⁹⁵ David Barboza, *Former Executive Pleads Guilty in China Milk Scandal*, N.Y. TIMES, Jan. 1, 2009, at A10.

⁹⁶ Zhonghua Renming Gonghe Guo Xing Fa [The Criminal Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong. Mar. 14, 1997, effective Oct. 1, 1997), translated in LAWINFOCHINA (last visited Aug. 29, 2009) (P.R.C.); see also Nanfang Baoye, *Sanlu Baoguang Qian Shiyue Jiemi, Cengxiang Jiance Jiguo Yinman Dunai Laiyuan* [Sanlu Covered the Sources of Tainted Milk Ten Months Before the Scandal Came to Light], NANFANG RIBAO, [NANFANG DAILY], Jan. 8, 2009.

⁹⁷ Yinggai Pan Tian Wanhua Sixing [Ms. Tian Wenhua Should be Executed], available at <http://www.newweekly.com.cn/BBS/showthread.php?t=819> (last visited Aug. 29, 2009) (stating that the public would not be satisfied if Tian were to be charged under Article 140 of the Criminal law, which did not carry the death penalty); see also posting of Qixiniao, *Sanlu Qian Dongshi Zhang Tian Wenhua Ruguo Beipan Sixing* [If Ms. Tian were Executed], <http://blog.huanqiu.com/?uid-52122-action-viewspace-itemid-50123> (Dec. 27, 2008, 21:09) (arguing that execution of Tian would mark the end of the flawed food safety system).

⁹⁸ Barboza, *supra* note 95.

⁹⁹ See Ye, *supra* note 59.

ones who introduced the chemical to deceive quality control. Third, after learning the milk contained melamine, Sanlu planned to take all measures necessary to find the source and implemented a series of measures to contain the spread of tainted milk (albeit steps that were not successfully carried out); and finally, Ms. Tian made two reports, on August 2 and August 29, 2008, to the local government, and the local government failed to take any action to deal with the crisis. On January 1, 2009, the trial court sentenced Ms. Tian to life imprisonment and the other managers to fixed terms of imprisonment.

B. Laws Disregarded

Based on what has been disclosed, Ms. Tian clearly did not consider the legal consequences of her decision to conceal the milk contamination. Indeed, legal counsel was not even present at Sanlu's emergency meetings. One might wonder if any laws obligated Ms. Tian to make the contamination public and issue an instant recall or should have at least compelled the local government to make a public announcement of the tainted products. As a matter of fact, China has a body of laws imposing serious legal penalties on both manufacturers that produce tainted foods and government officials who conceal information about poisonous food products.

1. The Criminal Law of the People's Republic of China (as amended in 2006)¹⁰⁰

The Criminal Law has several provisions that impose severe criminal sanctions on producers and sellers that produce counterfeits or substandard products causing serious bodily injuries or death. For example, Article 140 prohibits the production of adulterated products as well as the sale of counterfeits as genuine products, substandard products as good products, or unqualified products as qualified ones. For producers who violate this law, with sale amounts exceeding 2 million Yuan (U.S. \$ 280,000), it mandates sentences of fifteen years of fixed-term

¹⁰⁰ See Criminal Law, *supra* note 96.

imprisonment or life imprisonment. In addition, it imposes a fine of either fifty percent to twice the sale amount or a confiscation of total illegal proceeds.¹⁰¹

Similarly, Article 143 imposes criminal sanctions on producers and sellers of foods that do not conform to hygienic standards. For substandard products that cause food poisoning accidents or other severe food-borne diseases, the responsible parties face mandatory sentences ranging from several years of fixed-term imprisonment up to life imprisonment, depending on the severity of the circumstances. They may additionally face a fine of up to twice the sale amount.¹⁰²

Finally, Article 144 prescribes the most severe criminal punishment for producing adulterated foods. It applies to pro-

¹⁰¹ See *id.* art. 140

Any producer or seller who mixes up or adulterates products, sells counterfeits as genuine products, sells substandard products as good products, or sells unqualified products as qualified ones, with a sale amount of not less than 50,000 yuan and not more than 200,000 yuan, is to be sentenced to not more than two years of fixed-term imprisonment or criminal detention and may in addition or independently be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than 200,000 yuan and not more than 500,000 yuan, is to be sentenced to not less than two years and not more than seven years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than 500,000 yuan and not more than 2 million yuan, is to be sentenced to not less than seven years and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the sale amount is not less than two million yuan, is to be sentenced to 15 years of fixed-term imprisonment or life imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the same amount or confiscation of property.

¹⁰² See *id.* art. 143

Whoever produces or sells food that does not conform with hygienic standards, which sufficiently gives rise to food poisoning accidents or other severe food-borne diseases, is to be sentenced to not more than three years of fixed-term imprisonment and may in addition or exclusively be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing serious harm to human health, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when the circumstances are particularly serious, to be sentenced to not less than seven years of fixed-term imprisonment or life imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount or confiscation of property.

ducers and sellers of foods mixed with poisonous or harmful non-food materials. Under this article, committing the act itself calls for a sentence of not more than five years of fixed-term imprisonment. If the act gives rise to serious harm to human health, the sentence must be no less than five years and no more than ten years. If the adulterated products cause serious bodily harm or death, however, the sentence can be the *death penalty*.¹⁰³

2. The Product Quality Law of the People's Republic of China (Amended as 2000)¹⁰⁴

The Product Quality Law also includes provisions for criminal sanctions as well as administrative fines and victim compensation. Article 32 prohibits the production or sale of adulterated products, counterfeits, shoddy products, or substandard products.¹⁰⁵ Article 33 mandates that sellers inspect products

¹⁰³ See *id.* art. 144

Whoever produces or sells food that is mixed with poisonous or harmful non-food materials, or knowingly sells such things, is to be sentenced to not more than five years of fixed-term imprisonment or criminal detention and may in addition or exclusively be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing serious food poisoning accidents or other serious food-borne diseases and giving rise to serious harm to human health, the sentence is to be not less than five years and not more than ten years of fixed-term imprisonment and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount; when causing death or particular harm to human health, is to be punished in accordance with article 141 of the law.

See also art. 141

Whoever produces or sells fake medicines which are sufficiently able to seriously endanger human health . . . causing death or particular harm to human health, is to be sentenced to not less than ten years of fixed-term imprisonment, life imprisonment, or death penalty and may in addition be imposed a fine of not less than 50 percent of and not more than twice the sale amount or confiscation of property.

¹⁰⁴ Zhonghua Renmin Gonghe Guo Chanpin Zhiliang Fa [The Product Quality Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 8, 2000) *translated in* LAWINFOCHINA (last visited Aug. 30, 2009) (as literally translated in LAWINFOCHINA database it means "products liability law").

¹⁰⁵ See *id.* art. 32 ("Producers shall not adulterate their products or pose fake products as genuine or shoddy products as good or substandard products as standard.").

and verify product quality.¹⁰⁶ As penalties for producing adulterated products, Articles 49 and 50 require a stop of production and confiscation of illegal proceeds. In addition, fines may be imposed for more than fifty percent of but less than three times the sale amount and, for serious circumstances, the revocation of the producer's business license. For cases serious enough to constitute a crime, these articles require criminal investigation.¹⁰⁷

With regard to compensation, Article 44 provides that, when defective products cause bodily injury, the producer is liable for medical care expenses and lost earnings due to absence from work. Mandated compensation also includes living expenses for the injured party's dependants, if the defective product left the victim disabled, and funeral and living expenses of the decedent's surviving dependants, if the defective product caused death.¹⁰⁸

¹⁰⁶ See *id.* art. 33 ("Sellers shall implement the system of examination and acceptance of goods procured, verifying the product quality certificates and other marks.").

¹⁰⁷ See *id.* art. 50

If a producer or a seller is found adulterating their products or posing fake ones as genuine, inferior ones as superior, or sub-standard ones as standard, it shall be ordered to stop production or sale; the products illegally produced or sold shall be confiscated and a fine of more than 50% of but less than three times the value of the products illegally produced or sold shall be imposed; where there are illegal proceeds, such proceeds shall be confiscated; if the circumstances are serious, the business license shall be revoked; if the case is serious enough to constitute a crime, criminal responsibility shall be investigated.

see also art. 49

An enterprise producing products that do not conform to the state standard or the specific trade standard for ensuring physical health and the safety of the human body and property shall be ordered to stop production and sale; the products illegally produced and sold shall be confiscated; a fine less than three times the value of the products illegally produced or sold shall be imposed upon the producer or seller; where there are illegal proceeds, such proceeds shall be confiscated; if the circumstances are serious, the business license shall be revoked; If the case is serious enough to constitute a crime, criminal responsibility shall be investigated.

¹⁰⁸ See *id.* art. 44

If bodily injury is caused by the defect of products, the party responsible shall pay for medical expenses and nursing expenses during medical treatment and the lost income due to absence from work; if the bodily injury has resulted in disability, the party responsible shall also be responsible for the expenses for self-supporting equipment, living allowances, compensation of the disabled

3. Provisions on the Administration of Food Recall of 2007

In recent years, China has been plagued with massive food poisoning incidents. For example, on March 19, 2003, in Haicheng City, 2556 elementary students became ill after drinking the school district's designated soy milk. Over 100 students were hospitalized and one died. Local officials did not report the incident to the central government, as the law required, until parents contacted the media twenty-six days later.¹⁰⁹ Despite the government's pledge to improve food safety, there has been no sign of improvement. In 2006, the Ministry of Health reported nearly 200 incidents of school food poisoning, which sickened 6613 students and caused one death.¹¹⁰ Against this backdrop, the General Administration of Quality Supervision, Inspection and Quarantine (the QSIQ) issued the *Provisions on the Administration of Food Recall* (hereafter the *Recall Provisions*) on August 27, 2007.¹¹¹

According to the *Recall Provisions*, a food producer must keep a complete record of its food production process. Once the food producer knows or has reason to know that its products may pose a health hazard to consumers, it must promptly assess food safety and submit a report to the local QSIQ.¹¹² The food producer is required to report safety issues for its products to

person and the living expenses necessary for those under the support of the disabled person; if death has resulted, the party responsible shall pay for the funeral expenses, compensation, and the living expenses necessary for those supported by the dead; if the defect of product causes losses in property of the victims, the party shall be responsible for restoring or compensating for it; if the victims sustain other major losses, the party responsible shall compensate for the losses.

¹⁰⁹ Chen Lei, *Haicheng Dounai Shijian Zhongdu Xuesheng Jiazhang Lianhe Jinxing Qianren Susong* [Affected Parents of the Haicheng Food Poison Incident Brought a Class Action], WAITAN HUABAO, Feb. 3, 2004.

¹¹⁰ *Weisheng Bu Guanyu 2006 Nian Quanguo Shiwu Zhongdu Baogao Qingkuang de Tongbao*2007[77hao] [The Ministry of Health's Annual Report on Food Poisoning Incidents for 2006, The Ministry of Health Report 2007-No. 77], May 16, 2007, available at <http://61.49.18.102/newshtml/18966.htm> (last visited Jan. 9, 2010).

¹¹¹ Shipin Zhaohui Guanli Tiaoli [The Provisions on the Administration of Food Recall](promulgated by State Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), Aug. 27, 2007, effective Aug. 27, 2007), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

¹¹² See *id.* art. 13-14.

the local QSIQ, including consumer complaints.¹¹³ The food producer must cooperate with the local QSIQ's investigation and assessment. The assessment must be made as to one of three categories of food product recall: (1) a category I recall when the suspected products may cause serious bodily injuries or even death, or otherwise involve incidents with a large social impact; (2) a category II recall when the suspected products may cause a health hazard but with a moderate social impact; or (3) a category III recall when the suspected products may cause a moderate health hazard.¹¹⁴ The food producer may opt to voluntarily perform a recall by stopping production on the same day it reports the food contamination, and by making a public announcement. For a voluntary recall, the producer must report a detailed plan to the local QSIQ within three days. Alternatively, the State QSIQ will order a mandatory recall.¹¹⁵ Notably, the *Recall Provisions* set forth various sanctions for producers who refuse to issue a recall or conceal information about unsafe products.¹¹⁶

4. Laws on Public Health Emergencies

In addition to product safety laws, China has developed a series of laws that impose penalties on government officials for contributing to the creation of a public health emergency by providing false information to the government or concealing information from the government.

The Chinese legal and regulatory regime requiring information reporting related to public health risks took shape after China experienced several disastrous events. The first event that prompted the government to revamp its antiquated public emergency laws was the SARS (Severe Acute Respiratory Syndrome) epidemic in 2003.¹¹⁷ This epidemic started in a small town in Southern China in November 2002. Since the SARS vi-

¹¹³ See *id.* art. 9.

¹¹⁴ See *id.* art. 18.

¹¹⁵ See *id.* art. 25.

¹¹⁶ See *id.* ch. 4.

¹¹⁷ See generally Chenglin Liu, *Regulating SARS in China: Law as an Antidote?* 4 WASH. GLOBAL STUD. L. REV. 82 (2005).

rus was extremely contagious and had no cure, the best way to combat the disease was through quarantine and isolation.¹¹⁸ Unfortunately, the government initially concealed the relevant information for fear of damaging China's reputation and trade opportunities. As a result, the epidemic quickly gained momentum and erupted into an international health threat. The Chinese government was widely accused of covering up the outbreak.¹¹⁹

In April 2003, a new administration led by Mr. Hu Jintao took a transparent approach and openly launched a national campaign against the SARS epidemic.¹²⁰ As part of this campaign, both the Minister of Health and the Vice Mayor of Beijing were dismissed for covering up the outbreak.¹²¹ The government also enacted a series of new laws. *The Regulations on Dealing with the Outbreak of Public Health Emergencies* (hereafter the *Health Regulations*) played a pivotal role in establishing an effective communications system during the SARS epidemic.¹²² The *Health Regulations*, which remain in effect, provided a framework for the development of public emergency laws.

Major provisions of the *Health Regulations* define the reporting requirements. Article 19 provides that, if a public health emergency occurs, a provincial government that receives information of an epidemic has one hour to report it to the Health Ministry, which shall make a report to the State Council when it is of significant danger to the public. Article 22 prohibits any person from concealing, delaying, or falsifying a report of emergency information, or directing others to do so. Article 45 sets forth sanctions for any reporting violation, requiring the head of the department involved to take full responsibility for a failure to report. The penalties range from demotion to a lower administrative rank to outright dismissal, depending on the seriousness of the concealment. The article also leaves the door open

¹¹⁸ *Id.* at 83.

¹¹⁹ *Id.* at 89.

¹²⁰ *Id.* at 93.

¹²¹ *Id.* at 89.

¹²² Tufa Gonggong Weisheng Shijian Yingji Tiaoli [The Regulation on the Urgent Handling of Public Health Emergencies] (promulgated by the State Council, May 9, 2003, effective May 9, 2003), *translated in* CHENGLIN LIU, CHINESE LAW ON SARS (2004).

for criminal charges to be filed against the head of a department, if late reporting exacerbates the emergency.¹²³

The second event that contributed to the development of public emergency reporting laws was a widespread practice of falsely reporting mining accidents in order to avoid investigation and suspension of operations.¹²⁴ In a well-publicized accident, one of the shafts in the Fanzhi Mine exploded and killed thirty-eight workers. The owner forced victims' families not to disclose the real number of deaths and bribed a large number of local officials and eleven journalists to conceal information. After disposing of the bodies of the fallen workers in a remote region, the owner made an official report stating that there were only two casualties in the accident.¹²⁵ A local worker finally disclosed the scandal to the media several months later. Mine accidents are a major problem in China. In 2005, nearly 6000 miners died in various accidents related to flooding, fire, and explosions.¹²⁶ To prevent mining accidents, the government issued *The Regulations on the Reporting, Investigation and Disposition of Production Safety Accidents*.¹²⁷ Article 4 provides, "The accident reporting shall be timely, accurate and complete, and any entity or individual shall not delay, omit, falsify or conceal the reporting."¹²⁸

In addition, the People's Congress passed the sixth amendment to *The Criminal Law of China*.¹²⁹ In order to impose sanc-

¹²³ See Liu, *supra* note 117, at 95.

¹²⁴ Jiang Peng, *Kuangnan Fengkoufei An Jielu Zhe Cheng Meikuang Laoban Reng Yinman Zhenxiang* [Hush-Money Whistle Blower Claimed that Coal Mine Owners Still Concealed the Truth], XINWEN CHENBAO, Nov. 4, 2008.

¹²⁵ Liu Zheng, *Fanzhi Kuangnan Shuiluo Shichu Shigu Guocheng Zhenxiang Daba* [Fanzhi Coal Mine Accident Investigation Report], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Sept. 15, 2002.

¹²⁶ *Zai Kuangnan Zhong Shiwang de Renman* [Remembering Those Who Died in Coal Mine Accidents], CHINACITY.NET, Mar. 20, 2008, available at <http://www.chinacity.net/8168/8781/8787/253982.htm> (last visited Jan. 9, 2010).

¹²⁷ Shengchan Anquan Shigu Baogao He Diaocha Chuli Tiaoli [The Regulations on the Reporting, Investigation and Disposition of Production Safety Accidents] (promulgated by the State Council, Apr. 9, 2007, effective June 1, 2007), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

¹²⁸ *Id.*

¹²⁹ *Zhonghua Renmin Gonghe Guo Xing Fa Xiuzheng An* (Liu) [Amendment to the Criminal Law of the People's Republic of China (VI)] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2006, effective June 29, 2006), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

tions on officials who fail to report or make a false report of a public emergency, a new clause was added to Article 139, which provides:

Where, after any safety accident occurs, if the person who is obligated to report fails to do so or makes a false report, so that the rescue of the accident is affected, if the circumstances are severe, shall be sentenced to fixed-term imprisonment of not more than three years of detention. If the circumstances are extremely severe, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

In sum, China has sophisticated legal provisions that punish both food producers for making adulterated foods and government officials for concealing vital information that cause public health emergencies. The milk scandal demonstrated, however, that these laws were largely disregarded.

C. Profits above the Law: Reasons for Cover-up

China's rich body of laws, imposing penalties on those who cause or exacerbate public emergencies by covering up vital information, have often been ignored for various reasons, sometimes with disastrous consequences. The tainted milk scandal is a case in point. As a result of Sanlu's cover up, numerous families suffered unbearable pain that will continue indefinitely. How could Sanlu not issue a recall? What choice of values or priorities made Sanlu put profits ahead of consumers' lives? Why did the local government knowingly conceal Sanlu's transgressions?

1. Sanlu's Cover-up

In contemporary China, the pursuit of a robust gross domestic product (GDP), above all else, trumps laws that hinder economic growth.¹³⁰ After learning about the contamination, Ms. Tian had two possible options: either tell the truth or conceal it.

¹³⁰ See Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the "Takings" Law in China*, 29 HASTINGS INT'L & COMP. L. REV. 1, 25 (2005).

Telling the truth, she clearly understood, would precipitate disastrous consequences for Sanlu. She did not have the courage to do that on the eve of the Beijing Olympics, a historical event that allowed no room for bad publicity. In addition, telling the truth would probably have doomed not only her political future but also Sanlu's reputation. Moreover, even if Ms. Tian's conscience had compelled her to reveal the information relating to the tainted milk, the government would most likely not have allowed her to do so. To a large extent, Ms. Tian just did what the government expected her to do.¹³¹ When the executives from the Fonterra Group proposed a recall, both Ms. Tian and other Chinese board of directors and managers vigorously opposed it. So Ms. Tian opted for the second option of concealing the problem and quietly dealing with victims. In time, she may have reasoned, other events would likely distract the public's view and leave Sanlu unscathed. With her forty years of experience in the milk industry, Ms. Tian predicted that the odds of Sanlu surviving were great, as there was virtually no government oversight. In an environment where all corporations are judged solely by the standard of GDP, any other manager in Ms. Tian's position would have made the same decision. Indeed, Sanlu's debacle was not a surprise to the public in China. In the frequent and frantic pursuit of economic miracles, Sanlu was just another example of corporate greed producing unwanted consequences in China's chaotic marketplace. After all, many other industries had already been caught in similar scandals.¹³²

2. Local Government's Cover-up

To an outside observer, it may be surprising that a local government in China would be eager to cover up a scandal caused by a private enterprise. This paradox cannot be fully understood without examining the relationship between govern-

¹³¹ Anthony Kuhn, *Parents Question Chinese Milk Compensation Plan*, NPR.ORG, Jan. 5, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=99002599> (last visited Jan. 9, 2010) ("Anne-Marie Brady is an expert on Chinese politics at the University of Canterbury in Christchurch, New Zealand. She says Tian was just following orders.").

¹³² For more information regarding similar scandals in other industries, see *supra* Part III.A.

ment and business enterprises in China. Even though a market economy replaced a planned economy during the economic reforms of the 1980's, the influence of the socialist economic model has persisted.¹³³ While the government has withdrawn from oversight of the day-to-day operation of local industries, it still exerts a strong influence on them. In fact, the government has maintained various departments, corresponding to respective industries, with vice mayors or department chiefs tasked to provide guidance to their respective enterprises.

The ties between local government and enterprises have become mutually beneficial.¹³⁴ Enterprises depend on government for various advantages in areas such as land acquisition, infrastructure improvement, financial assistance, and favorable tax policies.¹³⁵ For example, to revitalize the milk industry after the milk scandal, local governments provided substantial financial aid to the milk producers.¹³⁶ In return for such support, local governments expect and rely upon local enterprises to increase local GDP. Since officials are judged by their ability to grow their local economies, the government takes all necessary measures to ensure the success of big enterprises. In some cases, local governments have instructed local courts not to enforce judgments from other provinces for the protection of local enterprises. The ties between enterprises and government officials have often been tainted with corruption. In Shanxi Province, for example, a number of local leaders, who were in charge of mine safety, actually held significant financial stakes in local mines with notorious safety records.¹³⁷

Under China's centralized system, officials at each level of government are appointed by officials at the next highest level.¹³⁸ In theory, the Chinese Communist Party (CCP) nominates one candidate for each key post in the government and an

¹³³ See Liu, *supra* note 130, at 7.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Huang Shuhui, *Neimenggu 1 Yi Yuan "Zhengfu" fei Jiu Yili Mengniu Wending Naiyuan Jidi* [Inner Mongolia Government Bailed Out Mengniu and Yili with 100 million to Stabilize Raw Milk Supply], *Dongfang Zhaobao*, Sept. 26, 2008.

¹³⁷ *Meikuang Guangu Chezi "Anliu" Xongyong Yixie Guanyuan Mingche Anchi* [Some Officials Still Secretly Hold Shares in Coal Mines], *XINHUA NEWS*, Oct. 28, 2005.

¹³⁸ Liu, *supra* note 122, at ch. 3.

election is held in the People's Congress. In practice, except at the village level, all the elections are uncontested and the CCP's nominees are always confirmed. In fact, the Central Government has constantly changed provincial governors with no more than notification to the local People's Congress. As a result, local officials are only accountable to superiors at the next highest level of government instead of the local people. With local GDP, the overwhelming standard for assessing the performance of local officials, local governments focus only on economic growth.¹³⁹ To the local government in Shijiazhuang City, Sanlu was one of the largest sources of revenue. Therefore, local officials did whatever it took to protect local business. Furthermore, without a separate and independent entity to ensure compliance with the laws on transparency, the officials had every incentive to conceal the information.

The most effective way to have controlled and minimized the impact of the poisonous baby formula would have been to initiate an instant recall and truthfully relay accurate information to the public. Any delay was bound to cause further damage not only to the victims but also to Sanlu and the local government. Therefore, time was of the essence in containing the public health emergency. Like Sanlu, however, the local government took every measure to do just the opposite: conceal relevant information.

As stated, Sanlu twice reported the contamination to the local government in August 2008, but the government neither released the information to the public nor reported it to the central government until the scandal broke. While the internal communications between Sanlu and the local government remain a mystery, a post-scandal public apology was quite revealing. On September 30, 2008, Mr. Wang Jianguo, a government spokesman, issued a rare public apology to the victims and further explained the reasons for the failure to immediately report the problem to the central government.¹⁴⁰ First, Mr. Wang at-

¹³⁹ See Liu, *supra* note 130, at 7.

¹⁴⁰ Dong Zhiyong, *Shijiazhuang Zhengfu: Sanlu Naifen Shijian Women You Buke Tuixie de Zeren* [Shijiazhuang Municipality: We are Responsible for the Milk Scandal], JINGJI RIBAO [THE ECONOMIC DAILY], Oct. 4, 2008.

tributed the failure to a lack of political sensitivity and a lack of consideration of people's health and safety.¹⁴¹ Second, Mr. Wang said that the government was responsible for failing to fully appreciate the serious political consequences of a scandal and was not able to recognize the social and economic costs of the tainted milk.¹⁴² On this point the government believed that, as long as Sanlu could improve quality, it could eventually restore the shattered image and regain public trust. Third, the local government believed in the paramount importance of Sanlu's high reputation in the national dairy industry and the large number of employment opportunities it provided to the city. Mr. Wang regretted that, because of the delay, the central government missed the opportunity to control the negative impact of the scandal.¹⁴³

The apology, far from achieving its intended result, instantly drew immense public criticism. As pointed out by Zhang Qianfan, a prominent constitutional law expert at Beijing University, Sanlu was not only an important source of local revenue but also local political legacy.¹⁴⁴ The apology revealed that the local government's first reaction was how to help Sanlu avoid bad publicity and eliminate the negative impact of a scandal. If the government had made the information public when it was known in August, it could have protected the health of numerous babies. The government, however, was not willing to confront the reality. With all the means in its power, the government tried its best to conceal the news and deal with the victims in private. Another commentator, Mr. Shao, discerned that the apology was not actually directed to the victims but to the central government itself.¹⁴⁵ The real purpose of the apology was to beg forgiveness from those high officials with the authority to determine the political futures of local leaders.¹⁴⁶

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Zhang Qianfan, *Yi Sanlu Naifen Shijian Weili: Shipin Anquan Libukai Meiti Jiandu* [Sanlu as an Example: Media Reporting is Indispensable for Ensuring Food Safety], NANFAN RIBAO, Oct. 7, 2008.

¹⁴⁵ Shao Jian, *Shijiazhuang Shi Zhengfu Jiuqing Gai Xiang Shui Daoqian?* [Whom did Shijiazhuang Government Owe an Apology?], ZHUJIANG WANBAO, Oct. 3, 2008.

¹⁴⁶ *Id.*

3. Lack of Media Supervision

The compulsion for cover up can also be attributed to a lack of an independent media capable of playing the role of corporate and government “watchdog.” Commenting on the Sanlu scandal, Professor Zhang Qianfan called for strong media supervision to force milk producers to attend to their social responsibilities.¹⁴⁷ The media in China, however, is unlikely to live up to this high expectation. According to a recent public survey published in the *China Youth Daily*, nearly fifty percent of those interviewed were not satisfied with the state media’s coverage of the milk scandal and only about twenty percent had confidence in the media’s ability to disclose accurate information and prevent cover ups.¹⁴⁸ A commentator observed that the state media seemed to do a better job in covering natural disasters, such as the Sichuan earthquake than in covering man-made disasters, such as the Sanlu scandal. Although it is true that Sanlu collapsed because of a news report that identified Sanlu as the primary source of the tainted milk, nevertheless the news came too late to prevent harm to the public.¹⁴⁹ According to many experts, numerous children could have been saved if the media had reported on this major health threat several months earlier, during or before the Beijing Olympics. As early as July 2008, Mr. He Feng, a journalist of *Nanfang Daily*, interviewed a large number of families whose children were injured by the tainted milk and the doctors who treated them. He confirmed that all of the products were from Sanlu. Unfortunately, Mr. He was not permitted to release the report because of a high order from the government’s Central Propaganda Department.¹⁵⁰

Many examples illustrate how local governments frequently pressure the media to not report critical information. In a well publicized case, a *Legal Daily* news report criticized a county government for its decision to take private property and hand it

¹⁴⁷ See Zhang, *supra* note 144.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

over to another private owner.¹⁵¹ Irritated by the report, Mr. Zhang, secretary of the CCP committee of Xifeng County, Liaoning Province, sent the County Propaganda director to the *Legal Daily's* office in Beijing demanding that the *Legal Daily* retract the report because it damaged the county's image. After being refused, Mr. Zhang sent several local police officers with an arrest warrant to the *Legal Daily*, intending to arrest the journalist who produced the report.

In China, corruption has tainted the journalism profession as much as the troubled industries on which they should be reporting. Historically, corporations commonly manipulated news reports with "hush money." In the mine accident cases, mine owners customarily bribed journalists not to speak out. Shortly after the Ganhe Coal accident, the mine owner handed out stacks of cash to both journalists and local officials during fallen workers' funerals. Allegedly, Sanlu paid RMB 3 million Yuan (U.S. \$430,000) to Baidu.com, the most popular search engine in China, to delete negative reports about Sanlu's products. If the allegation proves to be true, it was certainly a reprehensible move to stifle the media.¹⁵²

III. THE GOVERNMENT'S HANDLING OF THE CRISIS, COMPENSATION AND LITIGATION

The Chinese Government has faced several catastrophic events in recent years and gained great experience in dealing with crises. Soon after the tainted milk scandal came to light, the State Council called an urgent meeting in which Premier Wen Jiabao set forth a series of measures to deal with the public

¹⁵¹ Liu Wanyong, *Fumian Baodao Sheji Xianwei Shuji Liaoning Xifeng Gongan Jinjing Zhua Jizhe* [County Communist Party Chief Ordered Local Police to Arrest the Journalist in Beijing Who Produced a Negative Report on Him], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 7, 2008.

¹⁵² See, Shai Oster and Loretta Chao, *China Arrests 2 in Milk Scandal as Number of Sick Infants Rises*, WALL ST. J. Sept. 16, 2008, at A16; Joe McDonald, *China's Baidu.com Fights to Rescue Reputation*, BUSINESS NEWS, Nov. 20, 2008. See also, *Baidu's Role in Tainted Milk Scandal*, PEOPLE TO PEOPLE NEWS, Sept. 23, 2008, available at <http://p2pnet.multibox.be/story/17091> (last visited Dec. 14, 2009); *Leaked Memo Alleges Milk 'Cover-up'*, SUNDAY STAR TIMES, Sept. 27, 2008, available at <http://www.stuff.co.nz/national/648766> (last visited Dec. 14, 2009).

emergency.¹⁵³ In sum, these measures had a two-fold purpose: (1) to remove the local leader and the quality control chief under the newly developed principle—"Resignation upon Taking the Responsibility"—in the hope of restoring public trust; and (2) to provide assistance to affected families and institute a government-controlled compensation scheme in order to maintain social stability.

A. Resignation upon Taking the Responsibility

Since the SARS epidemic in 2003, the Central Government has instituted a policy called "Resignation upon Taking the Responsibility" (*yin jiu ci zhi*), to hold high officials accountable for major public emergencies. Most of the measures related to this policy have been subsequently codified in laws and regulations with the intent of creating a transparent and accountable government.¹⁵⁴ For example, Article 82 of the Civil Servant Law of the People's Republic of China provides:

Where a leading member causes any serious damage or social impact due to his severe mistakes in work or breach of duty or bears the leading responsibility for any serious accident, he shall take the blame and resign his leading post.

¹⁵³ Guowu Yuan Huiyi Jueding Quanmian Jiancha Naizhi Pin, Zhengdun Naizhi Pin Hangye [*The State Council Pledged to Step Up Dairy Product Inspections and Overhaul the Dairy Industry*], XINHUA NEWS, Sept. 17, 2008. The State Council mandated responsibility for handling the crisis on the heads of the governments at all levels. *Id.* It required all local governments to provide free medical services to affected children. *Id.* It charged the Ministry of Health to provide guidance in diagnosing and treating children sickened by the tainted milk. *Id.* It ordered the Quality Control Department to conduct a thorough inspection of all milk products on the market and to recall unqualified products. *Id.* The government promised to overhaul the entire milk industry and provide subsidies to dairy farmers to ensure an adequate milk supply. *Id.* In addition, it aimed to ensure milk quality and impose controls to prevent price gouging. *Id.* For accountability, it called for action to punish those who were responsible for the crisis and initiate a criminal probe into the scandal. *Id.* Additionally, it sought to provide guidance to news media to ensure accurate and prompt reporting and to probe the scandal. *Id.* Furthermore, it required all local governments to take necessary measures for maintaining social stability. *Id.*

¹⁵⁴ Xingzheng Jiguan Gongwuyan Chufen Tiaoli [Regulation on the Punishment of Civil Servants of Administrative Organs] (promulgated by the State Council, Apr. 22, 2007, effective June 1, 2007), translated in LAWINFOCHINA (last visited Aug. 30, 2009).

Where any leading member shall take the blame and resign his post or is no longer suitable for a present leadership post but fails to apply for resignation by himself, he shall be ordered to resign the leading post.¹⁵⁵

In the beginning, the public welcomed the government's apparent determination to clean up the scandal-laden bureaucratic system. Yet, when some resigned officials were later reappointed to high offices at different locations, the public rightly questioned the genuine purpose of the resignation system.¹⁵⁶ Internet bloggers sarcastically called it a system of "vacation with pay," referring to the full-fledged benefits that officials still enjoyed after resigning.¹⁵⁷ To the officials, a scandal was just a spell of bad luck after which they would make a comeback when the time was right. Critics also questioned the effectiveness of the resignation system and pointed out that it did not serve as a deterrent to prevent similar mistakes from occurring. Other critics pointed out that the current system focused disproportionately on the short-term sobering effect of the resignation at the time of crisis, rather than on long-term investigation, correction and prevention of bad practices.¹⁵⁸

Officials who resigned in the wake of a public emergency have rarely been investigated for their wrongdoing. A scholar argued that the government had a responsibility not only to conduct a thorough, objective investigation, but also to make its findings available to the public.¹⁵⁹

In practice, an official's resignation during a public emergency serves two pragmatic, but not necessarily noble,

¹⁵⁵ *Id.*

¹⁵⁶ Zhang Zhixin, *Guanyuan Wenze Jiongjing Daijie* [Unanswered Questions About the System of "Take the Responsibility and Resign"], BAN YUE TAN, Oct. 15, 2008; see also Qing Feng, *Sanlu Shijian Fangfan Sheng Yu Wenze* [Prevention is Superior to the System of "Take the Responsibility and Resign"], THE CHINESE CIVIL AND COMMERCIAL LAW NET, Oct. 7, 2008, available at <http://www.civillaw.com.cn/Article/default.asp?id=41153> (last visited Jan. 9, 2010).

¹⁵⁷ See Zhang, *supra* note 156.

¹⁵⁸ *Id.*

¹⁵⁹ Ji Weidong, "Wenze" Yu Xingzheng Luocheng Touming Hua ["Take the Responsibility and Resign" Principle and Administrative Transparency], THE CHINESE CIVIL AND COMMERCIAL LAW NET, June 5, 2008, available at <http://www.civillaw.com.cn/article/default.asp?id=39101> (last visited Jan. 9, 2010).

purposes. First, it may quell demands for public inquiries that could implicate other officials connected to the scandal. In effect, the resignation provides temporary relief from public resentment and directs public attention to other issues, while tending to insulate the remaining officials from scrutiny. Second, resignation diminishes the potential for internal opposition to corrective measures that may be implemented by the current administration to address the crisis. However, although resigning officials no longer have an official voice in the debate, they often continue to receive full employment benefits and may even continue to work for the government elsewhere. On several occasions, resigned officials have later moved up the ladder in a different part of the bureaucratic system.¹⁶⁰

Commenting on the Sanlu trial, some critics were surprised that the government conducted no legal investigation of the Shijiazhuang City Mayor who resigned during the scandal. Critics maintained that the officials who covered up the scandal should be prosecuted according to Article 397 of the Criminal Law of China, which provides:

State personnel who abuse their power or neglect their duties, causing great losses to public property and the state's and people's interests, shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention; and when the circumstances are exceptionally serious, not less than three years and not more than seven years of fixed-term imprisonment.¹⁶¹

Just four months before the Sanlu scandal, the public had high praise for Premier Wen Jiabao's quick action and great relief efforts in response to the devastating earthquake in Sichuan Province. They, however, had a far different opinion of

¹⁶⁰ *Id.*

¹⁶¹ See Zuigao Renmin Jiancha Yuan Guanyu Duzhi Qianquan Fanzui An Li'an Biaozhun de Guiding [The Supreme People's Procuratorate Rules Regarding Admission Standards for Official Dereliction Cases] art. 1 cl. 7 (promulgated by the Supreme People's Procuratorate, Dec. 29, 2005, effective Dec. 29, 2005) *translated by the author* ("the prosecutors shall initiate a criminal investigation if an official abused his power and caused one or more deaths by concealing information, making a false report or directing others to do so.").

the government's role in dealing with the milk scandal. Because the tainted milk was purely a man-made disaster, many believed it could have been prevented if the government had increased supervision.

Despite the critics' strong call for a criminal investigation of the removed officials who concealed the information, the public can expect staunch government unwillingness to bring charges under the new amendment to the Criminal Law of China. Similarly, the local People's Congress will not likely conduct a public hearing and formal inquiry. The reason is that further investigation might implicate more officials and irrevocably jeopardize the public's already precarious trust in the government. Some commentators have criticized the State Council's measures on the ground that they only temporarily dealt with the crisis and did not provide the type of long-term solution needed to restore public confidence in the government. Professor Zhang Qianfan responded with breath-taking criticism:

Today is not the age of the planned economy. Who believes that the average Joes are still dependent upon the government for living? No, they can depend on themselves. Why on earth do the average Joes need a government? . . . [I]f the government is incapable of assuming the responsibility for safeguarding food quality . . . China will face a crisis that could jeopardize the country's very existence. . . . We are heartbroken at Sanlu's greed, but we cannot forget to ask: where was the government before the scandal? Why did it only come to surface after the scandal erupted into a nationwide catastrophe?¹⁶²

B. Litigation, Compensation and Social Stability

After the scandal, many affected parents filed law suits with the local People's Courts seeking compensation. The courts declined to hear their cases. More than 100 lawyers offered free legal advice to affected parents, but local officials put pressure

¹⁶² Zhang Qianfan, *Zhengfu Bixu Baozhang Shipin Anquan [The Government Must Ensure Food Safety]* NANFANG DAILY, Sept. 27, 2008.

on them not to take on any cases involving the tainted milk. As a result, some lawyers withdrew their commitment.¹⁶³

1. Government Controlled Compensation Scheme

In the United States, many lawyers would line up to provide representation to the victims of this type of disaster on a contingent fee basis. Suits would inevitably go forward, either individually or by way of class-action litigation. In contrast, in China, civil litigation has never been an option in mass tort cases.¹⁶⁴ For example, in 2004, a state owned fertilizer plant discharged synthetic ammonia and nitrogen into the Tuojiang River, a fresh water resource for several densely populated cities in Sichuan Province. The pollution not only left one million people without fresh water for nearly a month, but also caused serious damage to the fish farms along the river, which lost over one hundred million Yuan (U.S. \$12 million) worth of fish. Similar to the Sanlu case, the top official in the fertilizer disaster took the blame and resigned. Two other lower level officials were criminally detained.¹⁶⁵

For compensation, the government offered a one-time payment to the affected farmers, many of whom deemed the payment too small to accept. In order to prevent private litigation, the Justice Bureau of Ziyang City issued an order requiring all law firms not to represent clients seeking compensation for the losses due to the pollution. In another related case, the government directly instructed the court not to take the cases.¹⁶⁶ In 2003, the Guangxi High People's Court issued an internal circular which required local courts not to hear sensi-

¹⁶³ Edward Wong, *Courts Compound Pains of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1.

¹⁶⁴ Wang Liming, Dean of the Renmin Univ. Sch. of Law, Zhongguo Renming Daxue Faxue Yuan Ju Xing Sanlu Wenti Zhuanjia Yantao Hui [Remarks at the People's University School of Law Special Conference on the Sanlu Scandal] (Oct. 10, 2008) (transcript available at <http://blog.ce.cn/html/77/101277-225052.html>).

¹⁶⁵ Lei Xiangpo, *Ziyang Sifaju Chu Hongtou Wenjian Buzhun Lushi Jie Tuojiang Wurang Guangxi* [Ziyang Legal Department Issued Red Tape Preventing Lawyers from Taking Cases Involving Tuojiang River Pollution], TIANFU ZHAOBAO, Sept. 24, 2004, available at

<http://www.people.com.cn/GB/shehui/1063/2805729.html> (last visited Jan. 9, 2010).

¹⁶⁶ *Id.*

tive cases. The circular listed thirteen types of undesirable cases that the government believed could cause class actions and social instability.¹⁶⁷

Instead of allowing civil litigation in response to the tainted milk scandal, the government again took a paternalistic approach by setting up a one-time compensation package totaling 1.1 billion Yuan (U.S. \$160 million). Under the plan, families of children who died from drinking the tainted milk would receive 200,000 Yuan (U.S. \$29,000). Those who suffered kidney stones would receive 2000 (U.S. \$292); sicker children would be paid 30,000 Yuan (U.S. \$4400). The compensation package would be paid by the twenty-two companies whose products were found tainted with melamine. A remainder of 200 million Yuan (U.S. \$29 million) would be used for future health problems that the afflicted children might develop.¹⁶⁸

Like the fish farmers, the affected parents were excluded from the decision process, and many of them considered the compensation too low to accept. A group of parents set up a website—jishibaobao.com—to organize parents not to sign the compensation deal with the companies. Unsurprisingly, the concerted efforts caused the government to take precautions. On January 2, 2009, when the web creator and some other parents planned to give a press conference in the hope of soliciting support from the media, the police detained them.¹⁶⁹

2. Social Stability Concern

The government did not allow civil litigation based on grave concerns over social unrest that an unfair judgment could spark. Those concerns were not unfounded. A report indicates that the number of public protests in China increased nearly ten

¹⁶⁷ Liu, *supra* note 130, at 23-24.

¹⁶⁸ Zhu Zhe and Cui Xiaohuo, *22 Dairy Firms to Pay \$160m in Compensation*, CHINA DAILY, Dec. 30, 2008, available at http://www.chinadaily.com.cn/bizchina/2008-12/30/content_7351824.htm (last visited Dec. 16, 2009).

¹⁶⁹ The Associated Press, *China: Parents in Milk Case Released*, N.Y. TIMES, Jan. 3, 2009, at A6.

times between 1993 and 2004.¹⁷⁰ Some public protests involved violent clashes between protesters and local police.¹⁷¹

Just six weeks before the Beijing Olympics, thousands of people, including middle school students, took to the streets in Weng'an County in southwest China.¹⁷² They protested the official handling of the death of a local teenage girl, whose relatives blamed the local police for a shoddy investigation and possible corruption.¹⁷³ The angry protesters burnt government buildings and overturned cars. The government did not admit wrongdoing, however, the county governor resigned shortly after the riot.¹⁷⁴ In November 2008, residents of Longnan City in Gansu Province angrily protested a demolition and relocation order issued by the local government. The protesters burned buildings and cars. The incidents in Weng'an and Longnan triggered more protests elsewhere. Taxi drivers in several provinces went on strike demanding that the government take tougher action against illegal taxis. In the recent issue of *Liaowang Magazine*, three prominent reporters warned that China was likely to face more social unrest in 2009.¹⁷⁵ The article cautioned that any mishandling of sensitive issues could lead to massive social disturbance.¹⁷⁶

: While scholars understood the government's concerns for social stability, they were also concerned about the downstream effect of the government's actions. On the government's com-

¹⁷⁰ Li Chaohai, *Nong Mingong Jiti Xingdong Weiquan Yu Canjia Jiti Xingdong Pinlu de Yingxiang Yinsu Fenxi* [An Analysis of Factors Affecting Rural Migrant Workers' Collective Action] (unpublished Ph.D. dissertation, State University of New York), available at <http://mumford.albany.edu/chinanet/events/guangzhou09/paper/An%20Analysis%20of%20Factors%20Affecting%20Rural%20Migrant%20Workers%20Collective%20Action.pdf> (last visited Jan. 9, 2010). Li's dissertation is the most comprehensive source of statistics about the occurrence of collective actions in China.

¹⁷¹ *Id.*

¹⁷² Luo Changping, *Guanfang Tongbao Weng'an Shijian Guocheng* [Official Report on the Weng'an Incident], CAIJING, July 1, 2008.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Zhu Suzhen, *2009 Nian Keneng Chengwei Qunti Shijian Gaofa Nian* [China is More Likely to Face More Social Unrest in 2009], REUTERS NEWS, Jan. 6, 2009, available at <http://cn.reuters.com/article/wtNews/idCNChina-3345820090106> (last visited Jan. 9, 2010).

¹⁷⁶ *Id.*

pensation package, Professor Wang Liming, Dean of the School of Law at Renming University, commented:

[In dealing with massive torts], the government always takes all responsibility to compensate the victims. There are some advantages to this method, because it is efficient, especially when the situation is complicated and a large number of people are affected. Another advantage is that it could probably prevent even greater social conflicts. As a result, it might be conducive to social stability. However, [excluding individual affected families] might not be a good idea. By taking the responsibility for compensation, the government essentially uses taxpayer's money to redeem the enterprise's illegal behavior, which is debatable. . . . we have to find a legal solution.¹⁷⁷

3. Technical Hurdles in Private Litigation

Even if the courts had been allowed to hear the tainted milk cases, many of the affected parents would not have relied on litigation. In fact, over 90% of the parents opted for government compensation and waived legal rights to sue the milk producers, despite considering the compensation inadequate.¹⁷⁸ The parents were reluctant to seek adequate compensation through litigation for several reasons.

First, the courts generally do not grant more compensation than the government because the courts exist as an integral part of the government, rather than as an independent branch.¹⁷⁹ Like other government officials, judges serve appointed five-year terms. In theory, the local congress appoints judges, but in practice the leader of the local government has the final say about reappointing or promoting judges. In addition, the government sets the courts' budgets and provides

¹⁷⁷ See Wang, *supra* note 164.

¹⁷⁸ Reuters, *90pc of families take toxic milk deal, China says*, ABC News, Jan. 24, 2009, available at <http://www.abc.net.au/news/stories/2009/01/24/2473662.htm> (last visited Dec. 15, 2009).

¹⁷⁹ DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 198 (Thomson West, 2d ed. 2009) ("Article 123 of the PRC Constitution provides that the people's courts are the judicial organs of the state and are vested with the state's adjudicative powers. Unlike the US legal system in which the judicial branch is a co-equal branch of government, the people's courts are subordinate to the people's congresses at each level.").

logistical support. To rule against the government plan would not only result in inconsistent treatment of victims of the same conduct, but also would jeopardize the judges' political futures.¹⁸⁰

Second, even if the parents received impartial treatment by the courts, tort law in China would fail to meet their expectations. Judicial compensation standards are extremely low.¹⁸¹ Additionally, Chinese tort law has long avoided embracing the idea of punitive damages.

Critics have called for, or seriously considered, the adoption of punitive damages in the Chinese tort system. Indeed, some proponents have argued that the Chinese legal system already embraces a type of punitive damages in the area of consumer protection¹⁸² and under other laws.¹⁸³ Article 49 of the Chinese

¹⁸⁰ *Id.* at 197 ("In sum, judges are beholden to the people's congresses or governments for funding, staffing and have no security of tenure.").

¹⁸¹ Yang Tao, *Guanzhu: Qiche Peichang Guodi 10% de Peichang Dengyu "Zhuangle Baizhuang"* [Inadequate Compensation in Auto Accidents Resulted in Reckless Driving], XINKUAI BAO, Nov. 5, 2007, available at <http://auto.anhuinews.com/system/2007/11/05/001884611.shtml>; see also Posting of Hao Zhijun, *Peichang Biaozhun Guodi Nanbao Anquan Shengchan* [Work Safety Concerns Because of Inadequate Compensation], Jan. 19, 2008, <http://blog.cqnews.net/?43879/viewspace-48558> (last visited Jan. 9, 2010).

¹⁸² Zhong Hua Ren Min Gong He Guo Xiao Fei Zhe Quan Yi Bao Hu Fa [The Law of the People's Republic of China on the Protection of Consumers' Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), translated in LAWINFOCHINA (last visited Aug. 30, 2009) (hereinafter "Chinese Consumer Protection Law").

¹⁸³ The Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses art. 8 (2003)

In case of any of the following circumstances, which causes the purpose of a contract for the sale of commodity houses to be unable to be realized, the buyer who is unable to obtain the house may request the rescission of the contract, refund of the already paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than one time of the already paid money for purchase of the house: (a) after the contract for the sale of commodity houses is concluded, the seller mortgages the house to a third person without notifying the buyer; (b) after the contract for the sale of commodity houses is concluded, the seller sells the house to a third person.

id. art. 9

If, when concluding a contract for the sale of commodity houses, the seller is under any of the following circumstances which causes the contract to be invalid or cancelled or rescinded, the buyer may request the refund of the already

Consumer Protection Law provides, "Business operators found to have committed fraud in providing goods or services shall, as demanded, compensate the consumer with a sum doubling what the consumers have paid for such commodity or services."¹⁸⁴

In many important respects, Article 49 differs significantly from the concept of punitive damages in the United States legal system. Article 49 bases the double payment on what the plaintiff paid for goods or services, not on the compensatory damages caused by the defendant. In the milk scandal, even if the affected families were allowed to recover double damages under Article 49, they could only be paid twice the amount they paid for milk powder, not twice the amount of their actual injuries. Thus, the so-called double damages provision does very little to punish wrongful conduct. In the United States, juries generally can award punitive damages "in cases involving egregious conduct to punish or make an example of the defendant."¹⁸⁵ Unlike compensatory damages, punitive damages operate as "private fines" intended to punish the defendant and to deter future wrongdoing.¹⁸⁶ Whereas compensatory damages redress the concrete loss caused by the defendant's wrongful conduct, punitive damages express the jurors' moral condemnation of such conduct.¹⁸⁷

Taking advantage of Article 49, Mr. Wang Hai waged a private war against producers of shoddy and substandard products. He set up his own lab to inspect suspect products and employed other quality agencies to do so at his expense. Once he

paid money for purchase of the house and the interest thereof, as well as the compensation for losses, and may also request that the seller should bear the liability for compensating no more than one time of the already paid money for purchase of houses: (a) the seller intentionally conceals the fact of not having obtained the certificate on permit of advance sale of commodity houses or provides false certificate on permit of advance sale of commodity houses; (b) the seller intentionally conceals the fact that the sold house has been mortgaged; (c) the seller intentionally conceals the fact that the sold house has been sold to a third person or is the house for compensation and resettlement due to demolition.

¹⁸⁴ Chinese Consumer Protection Law, *supra* note 182.

¹⁸⁵ VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 213 (Carolina Academic Press 4th ed. 2009).

¹⁸⁶ See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

¹⁸⁷ *Id.*

obtained crucial evidence of a fraudulent product, Mr. Wang would file a lawsuit against its maker seeking the double payment award. In many instances, Mr. Wang bought products that he clearly already knew were counterfeit and filed subsequent lawsuits against the producers. While many scholars supported Mr. Wang's practices, some were disturbed. They claimed that the only goal of Mr. Wang's efforts was personal enrichment, and some were convinced that Mr. Wang himself had engaged in fraudulent practices for which he should be prosecuted. Mr. Wang's self-imposed role as private prosecutor was well received by the public, but not by the government because he encroached upon their authority and caused public mistrust of the government. Consequently, Mr. Wang soon found that courts would no longer hear his cases.¹⁸⁸

In light of the tainted milk scandal, critics once again raised the issue of whether punitive damages should be imposed on sellers of defective products. Opponents, however, argued that punitive damages are not suitable in the Chinese legal system.¹⁸⁹ They maintained that the primary purpose of tort law is to compensate the victim, not to punish the perpetrator; that punitive damages fall within the realm of criminal law, not tort law; and that, because of a difference in the burden of proof applicable in civil and criminal cases, the civil legal system lacked procedures needed to protect defendants' rights. Opponents were also concerned that punitive damages would impose an undue burden on business operators, thus hindering economic development. Additionally, if punitive damages were imposed, they believed that producers would rely upon insurance to pass the costs of punitive damages back to consumers. Finally, they theorized that a system allowing punitive damages could spawn frivolous lawsuits, waste judicial resources, create moral hazards, and result in unjust

¹⁸⁸ See Cui Guangping, *Lun <<Xiaofeizhe Quanyi Baohu Fa>> de Jiazhi he "Wang-hai" Xianxiang de Falu Shiyong* [Comments on the Value of the Consumer Protection Law and Its Application in the "Wang Hai" Case], available at <http://www.lunwentianxia.com/product.free.7825967.1/> (last visited Jan. 9, 2010).

¹⁸⁹ Zhou Bin, "Huang Jing An" Yifa Xiaofeize Weiquan Sikao, *Chengfaxing Peichang You Duo Yuan* [A Valuable Lesson Learned from the Huangjing Case: Is the Chinese Tort System Likely to Embrace Punitive Damages?], *FAZHI RIBAO* [THE LEGAL DAILY], Dec. 11, 2008.

enrichment of consumers. For these reasons, it remains unlikely that the government will incorporate the concept of punitive damages into Chinese law any time soon.

Instead of allowing for private litigation with punitive damages, the government would prefer to set up a fine-only system.¹⁹⁰ Shortly after the milk scandal, the State Council issued the Regulation on the Supervision and Administration of the Quality and Safety of Dairy Products.¹⁹¹ Article 57 stipulates that a dairy product seller in violation of the regulation, that does not stop selling or does not recall substandard dairy products which may harm human health and safety, or the growth of infants, would be subject to a fine of up to fifteen to thirty times the value of the illegal dairy products and have its license revoked.¹⁹²

Professor Wang has pointed out that administrative fines would not likely achieve the same level of deterrence as punitive damages.¹⁹³ Moreover, local governments know that the shattering of economic enterprises that would be caused by heavy fines and license revocation would directly reduce tax revenues and impede local economic development. Realistically, given the close ties between the local milk companies and local governments, administrative fines might not be imposed for fear of damaging the reputation of local industry, regardless of whether the law was violated.

CONCLUSION

The milk scandal centered on melamine additives because that chemical quickly injured or killed infants. On record, melamine tainted milk has sickened nearly 300,000 infants and children, six of whom died. So far, there have been no reported cases of illness or death involving adults, but that does not mean that milk tainted with high doses of melamine is safe for

¹⁹⁰ See Wang, *supra* note 164.

¹⁹¹ Guowuyuan: Ruye Zhiliang Anquan Jiandu Guanli Tiaoli [State Council: Regulation on the Supervision and Administration of the Quality and Safety of Dairy Products] (promulgated by the St. Council, Oct. 6, 2008, effective, Oct. 6, 2008).

¹⁹² *Id.*

¹⁹³ See Wang, *supra* note 164.

adults. Compared with infants, the food intake of adults is much more diverse; therefore, it is considerably more difficult for adult consumers to prove a causal link between their illnesses and melamine, even if they suffered kidney problems. For this precise reason, the government-controlled compensation plan specifically excludes adults.

Problems other than melamine adulteration continue to plague the dairy industry in China. One commentator cautioned, "melamine is just the tip of the iceberg."¹⁹⁴ Milk processors have routinely used numerous questionable additives, both legal and illegal alike, including excessive antibiotics, growth hormones, pesticide residues, preservatives, and color agents. Unlike melamine, no one has scrutinized these substances because their detrimental effects have not been as instantly destructive. As a result of the milk scandal, a number of consumers have given up consumption of dairy products altogether. A survey indicated that 8% of consumers refuse to allow their children to drink milk. As a precaution, many consumers have switched to dairy substitutes.¹⁹⁵ Under the same regulatory regime, however, who can be sure that the substitutes are safer than milk? And what about similar implications in the larger food safety context? Dairy product processing only accounts for a small fraction of the food industries in China. Yet, as long as massive illnesses are not associated with a single brand, food industries will continue to conduct "business as usual." Unless the government conducts a complete overhaul of the food supervision system, chances are the same type of scandal will strike again.

Objectively, a tragedy like this one offers a rare opportunity for the government to examine its regulatory regime and make necessary changes. The government's measures during the crisis, however, fell far short of public expectation. First, the so-called "take the responsibility and resign" principle lost its credibility because the government did not initiate criminal

¹⁹⁴ Susan Thixton, *Melamine May Be Just the Tip of the Iceberg*, NATURALNEWS.COM, available at <http://www.naturalnews.com/025017.html> (last visited Jan. 9, 2010).

¹⁹⁵ Zheng Xue, *Qicheng Ren Jianyi QuxiaoWenti Naifen Qiye Chimin Shangbiao Chenghao* [Seventy Percent of Consumers Surveyed Called for Abolition of So-Called "Well-Known Trademarks"] HENAN SHANBAO, Sept. 25, 2008.

investigations against the removed officials and the public felt deceived when the disgraced officials were quietly reappointed to other government posts. Second, the government-controlled compensation plan drew heavy criticism by not considering the affected families' expectations. Most of the families found the compensation amounts unacceptably low and disproportionate to the harm they suffered. Since the government instructed courts not to take cases involving victims of the milk scandal, the families were left with no adequate remedy for justice. Thirdly, to revitalize the milk industry after the scandal, the government generously injected capital to save the local firms. In the public's eye, this action sent the completely wrong signal to the entire industry. The fall of the milk industry was entirely its own fault; therefore, the government's financial assistance could only serve to embolden the industry's disregard for people's health and safety.

In theory, the government should be able to rely on market forces to induce milk processors to internalize the cost of doing business in order to provide quality goods. Yet, as stated in Part I, competition does not necessarily ensure product safety. To the contrary, competition in the unregulated milk market actually caused a relaxation of quality controls with costs passed on to consumers. Without properly structured and enforced regulation in place, a milk processor has no incentive to incur costs in building its own dairy farms while competitors undercut its market by processing milk from individual dairy farms at a lower cost. To solve the problem in the long run, the government should require that a high percentage of raw milk must come from milk processors' own dairy farms. In essence, the government should raise the bar for the milk processing industry across the board. If milk processors bear the costs for operating and maintaining dairy farms as a requirement of staying in the market, it would provide an infrastructure for enabling significant improvement in the control of milk quality and safety. Only in such a regulated market will competition among milk processors truly benefit consumers.

To further ensure milk quality, the government should realize that private litigation can complement regulatory supervision and remedy loopholes in the government's

regulations. Without the possibility of consumer litigation to address food safety issues, there is little incentive for milk processors to correct their problems, given their close governmental ties. Despite the judicial system's present inability to adequately address compensation issues, the ability of injured persons to file lawsuits could offer an effective mechanism for providing redress for harm caused by dangerous products and deter misguided production processes. Moreover, trial proceedings would shed light on processors' hidden but dangerous practices. Private litigation would also force milk processors "to examine harmful practices that might otherwise receive inadequate attention."¹⁹⁶ In essence, litigation would compel milk producers to internalize the costs of doing business and take precautions long before problems arise.

Understandably, in China, government concerns about social stability underlie fears relating to private litigation. However, these fears are largely misplaced. Contrary to the government's belief, private litigation is a social safety valve, enabling aggrieved consumers to redress their wrongs in a civilized manner.¹⁹⁷ Without litigation, victims of injuries caused by tortious acts are prone to resort to violence.¹⁹⁸ In reality, private litigation can actually reduce pressure on the government by providing a structured mechanism for airing grievances, obtaining compensation, and holding malefactors responsible for injurious practices. Litigation is not a threat to social stability, but rather an orderly process for avoiding the types of institutional unaccountability that threaten to generate challenges to social order. The government should also realize that the availability of remedies through private litigation can be conducive to social stability.

¹⁹⁶ Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L. J. 655, 671 (2007).

¹⁹⁷ *See id.* at 671.

¹⁹⁸ *Id.*



THE INTANGIBLES OF PAYMENT STREAM STRIPPING: WHY ARTICLE 9 SHOULD NOT LEAVE YOU BARING YOUR ASSETS (APPLYING A COMMON LAW REMEDY TO A CREATURE OF STATUTE)

David P. Weber*

*"Take away the motive and you take away the sin."*¹

INTRODUCTION

Imagine purchasing a new car, and then, moments after its delivery, discovering the vehicle's engine was not included. As unlikely as the scenario may seem, purchasers of equipment leases may find themselves in a similar situation. For example, assume Leasing Co. is in the business of leasing heavy construction equipment. In order to maintain liquidity, Leasing Co. sells the rights to the lease payments to a third party, Investor Co. In this transaction no other documents, such as a promissory note, are given as security. Investor Co. has purchased the interests and therefore begins to receive the monthly payments. Leasing Co. may or may not continue acting as the servicer of the leases. Under Article 9, Investor Co.'s interests in the stripped payment streams are automatically perfected, and therefore it does not need to take possession of the leases nor file a financing state-

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¹ Miguel de Cervantes Saavedra *quoted in* CUYLER REYNOLDS, THE BANQUET BOOK: A CLASSIFIED COLLECTION OF QUOTATIONS DESIGNED FOR GENERAL REFERENCE, AND ALSO AS AN AID IN THE PREPARATION OF THE TOAST LIST, THE AFTER-DINNER SPEECH, AND THE OCCASIONAL ADDRESS; TOGETHER WITH SUGGESTIONS CONCERNING THE MENU AND CERTAIN OTHER DETAILS CONNECTED WITH THE PROPER ORDERING OF THE BANQUET 77 (1902); also translated, "Take away the cause, and the effect ceases." Miguel de Cervantes Saavedra *quoted in* JOHN COOK, THE BOOK OF POSITIVE QUOTATIONS 440 (Steve Deger & Leslie Ann Gibson eds., Fairview Press 2d ed. 2007) (1993).

ment. If Leasing Co. finds itself in financial distress, it may attempt to resell the same interests it has already sold to Investor Co. In that case, Subsequent Investor Co. may perform due diligence but not find any record of the previous sale, and agree to purchase the interests from Leasing Co. Under the former rules of priority, Subsequent Investor Co. would normally be deemed to have a superior interest to Investor Co.; however, because of the new rules governing payment intangibles, Investor Co., with its "hidden" interest, would prevail.

This separating or "stripping"² of payment streams from underlying equipment lease transactions may create hidden priority interests, as demonstrated in the hypothetical above, in the secured instrument marketplace.³ These hidden priority interests could reduce the value of the paperized instruments by subordinating future interests in the underlying leases.⁴ By allowing such hidden liens, subsequent bona fide purchasers of leases are subordinated to previously unknown and unrecorded third-party interests in the payment streams, thus creating sanctioned market inefficiencies. Additionally, Article 9 of the U.C.C.⁵ ("Article 9") allows other priority ambiguities to exist due to the automatic perfection of certain interests.⁶ The statutory text giving rise to the problem presents a definitional question: whether certain collateral is a "payment intangible" (with

² Payment stream "stripping" is a type of collateral fractionalization pursuant to which the right to receive payment streams is separated from the underlying instrument. See Michael D. Sousa, *Much Ado About Nothing? Collateral Fractionalizing and In re Commercial Money Ctr. Inc.*, AM. BANKR. INST. J., Apr. 2007, at 28, 28.

³ *Id.* (stating that designating payment streams as payment intangibles creates uncertainty in the secured instrument marketplace and would potentially allow for the creation of "secret liens").

⁴ See *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 479 (B.A.P. 9th Cir. 2006) (noting the argument that allowing automatic perfection of payment streams could "wreak havoc on the financing markets"), *affg in part, rev'g in part* 56 U.C.C. Rep. Serv. 2d (CBC) 54 (Bankr. S.D. Cal. 2005). On appeal, the Ninth Circuit ruled on essentially the same issues of perfection as did the district court. Because this note references both decisions, I will refer to the Ninth Circuit decision as "Commercial Money Center," and will refer to the district court decision as "Kipperman" in textual references.

⁵ See generally U.C.C. §§ 9-101 to 9-709 (2005).

⁶ In fact, at least one commentator questions whether any economic benefits flow from payment stream stripping. See David Frisch, *Chattel Paper, Shakespeare, and the Insoluble Question of "Stripping"*, 40 UCC L.J. 3, 19 (2007).

potential automatic perfection) or “chattel paper” (which requires filing and/or possession).

At least four serious problems are presented by the current characterization of certain collateral as payment intangibles. First, potential purchasers of leases with supposed underlying payment streams cannot ascertain the quality and value of the purchased leases, given that previous transfers may have been automatically perfected.⁷ Second, purchasers of stripped payment streams (i.e., those who arguably should benefit from automatic perfection) will likely need to file financing statements, take possession of the underlying chattel paper, and/or legend the chattel paper in order to guarantee their relative priority position.⁸ Third, the potential for hidden interests provides economic incentives for financially distressed sellers of secured interests in payment streams to resell the underlying shell leases to unsuspecting third parties.⁹ Fourth, there is now confusion in what were previously settled priority rights as between creditors with conflicting perfected interests.

Part I of this article will analyze the statutory text and comments, the purpose of Article 9, and the case law regarding the contradictory characterizations of stripped payment streams as chattel paper and payment intangibles. Part I will also briefly mention the potential (mis)classification of stripped

⁷ See Sandra Stern, *In re Commercial Money Center, Inc.—Fractionalizing the Collateral*, in WHAT LAWYERS NEED TO KNOW ABOUT U.C.C. ARTICLE 9: SECURED TRANSACTIONS 2008, at 203, 209 (PLI Comm'l Law & Practice, Course Handbook Ser. No. 903, 2008) (noting that due diligence in an acquisition of an interest in a payment intangible will now require greater scrutiny to determine, to the extent possible, whether any such interest had previously been transferred or assigned); see also Alan M. Christenfeld & Shephard W. Melzer, *Securitization of Payments Under Equipment Leases*, N.Y.L.J., Oct. 4, 2007, at 5 (noting that no prophylactic measures can entirely protect against prior fraudulent or duplicative transfers).

⁸ See U.C.C. § 9-330 cmt. 5 (2005) (noting that the common practice for transfers of chattel paper includes placing a “legend” on the paper to indicate any assignments). This practice serves to benefit subsequent acquirers of chattel paper by providing more information to a subsequent party in possession of legended paper. *Id.* This practice more closely “comports with the expectations of . . . chattel paper financiers.” *Id.*

⁹ See Steven L. Schwarcz, *Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary*, 68 OHIO ST. L.J. 273, 277 (2007) (commenting on the risk that no priority in the intangibles exists for the subsequent purchaser due to a transferor's nefarious intent or mistaken belief, and that purchasers of such interests in the payment streams would need to rely solely on the “transferor's word that such intangibles have not been previously sold”).

payment streams as "accounts" and the implications of treating stripped payment streams as secured loans rather than sales. Part II will examine the economic inefficiencies and undesirable market incentives presented by the current version of Article 9, as well as the unsolved problems with competing priorities and shifting collateral issues. Part II will also discuss the policy implications behind the issue of shifting priorities, and will set forth the market-based and legal reasons for disallowing hidden priorities under Article 9.

Part III of this article will outline possible arguments in favor of a different interpretation of Article 9's treatment of stripped payment streams, as well as possible amendments to correct the unintended consequences of the 1999 revisions to Article 9.¹⁰ These revisions, taking nearly ten years to finalize, proposed many changes to deal with problematic issues in the secured transaction marketplace and represent what is now known as revised Article 9.¹¹ Finally, Part III will set forth two immediately available interpretations of law—either a version of the common law merger doctrine or a more detailed reading of the comments of Article 9—that could allow for a decision in favor of a subsequent acquirer of chattel paper without revising Article 9. Either alternative could eradicate the priority and improper incentive concerns that arise from allowing hidden automatically perfected security interests, and both could be implemented immediately.

I. JUDICIAL INTERPRETATIONS OF STRIPPED PAYMENT STREAMS—PAYMENT INTANGIBLES, CHATTEL PAPER, OR ACCOUNTS

Several courts have grappled with the stated purposes of Article 9¹² and the challenges that arise from the current ver-

¹⁰ See Stephen L. Harris & Charles W. Mooney, Jr., *Introduction to the Symposium on UCC Revised Article 9*, 74 CHI.-KENT L. REV. 857, 857 (detailing the multi-year process in drafting revisions to Article 9 and noting the expected, and since executed, implementation of the revisions).

¹¹ *Id.*

¹² See pre-revision U.C.C. § 9-101 cmt. 1 (1999) ("The aim of [Article 9] is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty."). See

sion's definition and treatment of payment intangibles.¹³ A 2006 decision of the Ninth Circuit Bankruptcy Appellate Panel (B.A.P.) ruled directly on the characterization of stripped payment streams.¹⁴ In *Commercial Money Center*, Commercial Money Center, Inc. ("CMC") originated equipment leases and thereafter bundled and assigned payment streams under the leases to third-party investors.¹⁵ NetBank, FSB ("NetBank") purchased the rights to payment under several of the bundled lease pools for forty-seven million dollars.¹⁶ Subsequently, CMC filed for bankruptcy protection, and the trustee in bankruptcy

also Sousa, *supra* note 2, at 28 (citing *Estate of Haas v. Metro-Goldwyn-Mayer, Inc.*, 617 F.2d 1136, 1140 (5th Cir. 1980); *Ferris, Baker Watts, Inc. v. Stephenson (In re MJK Clearing, Inc.)*, 286 B.R. 109, 123 n.13 (Bankr. D. Minn. 2002)) ("The fundamental purpose of Article 9 is to create certainty by allowing creditors to rely on specific perfection and priority rules that govern collateral within the scope of Article 9.").

¹³ See *Houston v. Eiler (In re Cohen)*, 305 B.R. 886, 903 (B.A.P. 9th Cir. 2004) (holding that an interest in a tort cause of action is a general intangible but not a payment intangible because the required monetary obligation is lacking until such time as a contractual obligation to pay a judgment or claim arises); see also *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, 519 F. Supp. 2d 515, 522-23 (E.D. Pa. 2007) (holding that an interest in contingent legal fees not yet earned is properly defined as an "account" instead of a "payment intangible" because there is always a right to payment, but the contingent portion is the amount that may be collected). Additionally, previous courts have grappled in other contexts with issues involving the stripping of a monetary stream for an underlying asset. See *In re Mintz*, 192 B.R. 313, 317 (Bankr. D. Mass. 1996) (holding that distribution rights under a limited partnership interest were properly characterized as "general intangibles") (citation omitted); *Biase v. Cong. Fin. Corp. (In re Tops Alliance City, Inc.)*, 372 F.3d 510, 514 (3d Cir. 2004) (holding that the right to proceeds under a real estate lease was properly classified as an "account" under U.C.C. § 9-102(a)(2) even though the actual asset underlying the lease was not subject to Article 9).

¹⁴ *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 479 (B.A.P. 9th Cir. 2006). "The principal issue in this case appears to be one of first impression for us or any court of appeals." *Id.* at 469. In addition to a single appellate level decision regarding the characterization of these payment streams, the area of chattel paper and the underlying rights of the chattel paper has not been developed as much as other areas of the U.C.C. See Joseph H. Levie, *Security Interests in Chattel Paper*, 78 YALE L.J. 935, 935 (1969) (stating that "[c]hattel paper financing is probably the least known major area of secured transactions law"); Thomas H. Jackson, *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. CHI. L. REV. 1051, 1051 (1983) (noting the "incomplete understanding" of the interrelationship between chattel paper and rights in the underlying goods); cf. 1 BARKLEY CLARK & BARBARA CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 1.01(2)(b) (rev. ed., 2007) (noting that there is now good case law on almost every section of Article 9).

¹⁵ See *In re Commercial Money Ctr., Inc.*, 350 B.R. at 469-72.

¹⁶ *Id.*

sought to avoid NetBank's interest in the payment streams.¹⁷ The crucial issue addressed by the B.A.P. was whether the payment streams were chattel paper, requiring a purchaser to file or take possession to perfect, or a payment intangible, with automatic perfection.¹⁸

Reversing the bankruptcy court,¹⁹ the B.A.P. determined that the stripped payment streams from an equipment lease were "payment intangibles"²⁰ rather than "chattel paper"²¹ under Article 9.²² However, the court declined to comment on the potential ambiguities in priorities this classification created for competing security interests.²³ Nevertheless, the characterization of payment streams is critically important because it determines the manner of perfecting a security interest therein.²⁴

¹⁷ *Id.*

¹⁸ *Id.* at 473-75.

¹⁹ See generally *Kipperman v. NetBank, FSB (In re Commercial Money Ctr., Inc.)*, 56 U.C.C. Rep. Serv. 2d (CBC) 54 (Bankr. S.D. Cal. 2005).

²⁰ U.C.C. § 9-102(a)(61) (2005) ("Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.). "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software." *Id.* § 9-102(a)(42). [Author's note: All references to the U.C.C., and the Official Comments are to the Revised Article 9 unless otherwise noted. The principal cases discussed in this Article were decided under various states' laws which have adopted Revised Article 9 or were decided prior to Revised Article 9; however, other than numbering, there are no material differences between the states' versions and the uniform version of the relevant provisions. See, e.g., *In re Commercial Money Ctr., Inc.*, 350 B.R. at 474.]

²¹ § 9-102(a)(11) ("Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods.).

²² *In re Commercial Money Ctr., Inc.*, 350 B.R. at 474-81.

²³ *Id.* at 480 ("We explicitly decline to resolve [the ambiguity created by undisclosed interests in chattel paper] in Revised UCC Section 9-330(b), because neither that statute nor the hypothetical situations posed by the parties are before us on this appeal."). The Ninth Circuit B.A.P. did note that there may be certain inefficiencies with the present definitions of "chattel paper" and "payment intangibles" that may need to be addressed in the future. *Id.*

²⁴ See § 9-309(3) (noting that a security interest in a payment intangible is automatically perfected upon attachment); *id.* § 9-312(a) (providing that a security interest in chattel paper may be perfected by filing); *id.* § 9-313(a) (noting that a security interest in tangible chattel paper may be perfected by taking possession of the collateral); *id.* §

While a security interest in payment intangibles is automatically perfected upon sale of the payment intangible,²⁵ and an interest in chattel paper can be perfected through filing or possession,²⁶ only filing can perfect an interest in an account.²⁷ Notably, several courts have confronted the challenges of defining payment intangibles²⁸ and handling the problems inherent in such classification.²⁹

A. Structuring the Stripping—Understanding the Fractionalization of Payments

The general business of equipment lessors is to purchase and lease equipment, securitize the payment streams under those equipment leases, and then sell the rights in those payment streams to third parties in order to generate liquidity and access to cheaper financing from their otherwise illiquid assets.³⁰ The originator of the leases (i.e. the original equipment

9-310(a) (stating the general rule for perfection of security interests, including for “accounts,” requires filing a financing statement).

²⁵ See *id.* § 9-309(3). Additionally, Article 9 does not provide any mechanism to determine between leases and sales, and as such, this particular concern has always been dealt with judicially. *Id.* § 9-109 cmt. 5 (“[N]either [Article 9] nor the definition of ‘security interest’ in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest.”). Additionally, the term “purchaser” under Article 9 generally includes a secured lender. See *id.* § 1-201(b)(29)-(30) (defining a purchaser as “a person that takes by purchase,” including taking by, *inter alia*, a pledge, lien, or security interest).

²⁶ See *id.* §§ 9-312(a), 9-313(a).

²⁷ See *id.* § 9-310(a).

²⁸ Compare *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, 519 F. Supp. 2d 515, 528-29 (E.D. Pa. 2006) (stating that rights to payment in unmatured contingency fee agreements were “accounts” rather than “general intangibles”), with *Houston v. Eiler (In re Cohen)*, 305 B.R. 886, 904 (B.A.P. 9th Cir. 2004) (stating that the right to a personal injury judgment was a “general intangible” rather than an “account” or “payment intangible”).

²⁹ See generally *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 465 (B.A.P. 9th Cir. 2006); *Kipperman v. NetBank, FSB (In re Commercial Money Ctr., Inc.)*, 56 U.C.C. Rep. Serv. 2d (CBC) 54, 59-64 (Bankr. S.D. Cal. 2005). See also Sousa, *supra* notes 2-3 and accompanying text (noting that the timing and manner of perfection of a security interest in an asset characterized as a payment intangible can give rise to hidden security interests).

³⁰ See Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1371 (1991) (“Securitization has been a boon to virtually every participant in the capital markets, including . . . borrowers seeking to lower their cost of funds by broadening their access to the capital markets; [and] investment bankers generating income by underwriting, making mar-

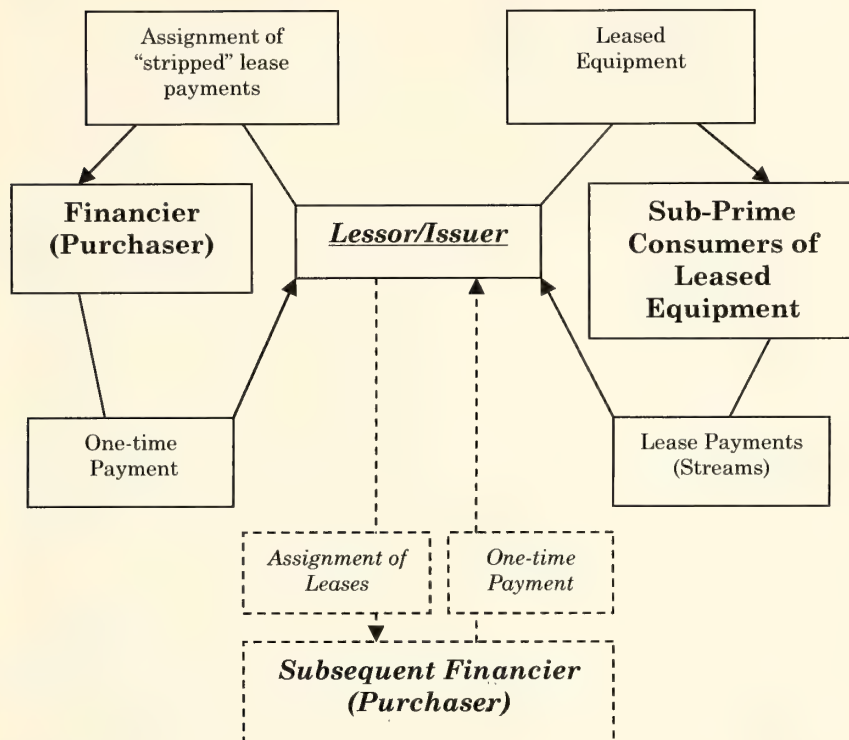
owner/lessor) often remains as the servicer of the leases.³¹ When the originator remains as the servicer, the lessees may never learn that any entity other than the originator has rights in the payment streams or the underlying equipment leases. Uncertainty arises under the law of secured transactions when the lessor grants or sells separate interests in the leases and the payment streams, thereby fractionalizing the two interests.³² The chart below demonstrates a simplified version of a structure³³ that may be used to accomplish this type of financing (along with a potential subsequent purchaser):

kets in, and trading asset-backed securities . . ."). In the case of subprime leases, the pool of payment streams may receive a lower than desired credit rating. In such cases, the parties seeking to securitize these assets may attempt to obtain credit enhancements, usually in the form of surety bonds guaranteeing the payments under each individual lease. Then, if the surety bond is obtained, the guaranteed payment streams are bundled into a pool and sold to or borrowed against with a third-party financier. See also Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 *FORDHAM L. REV.* 2039, 2040-51 (2007). The purpose of the surety bond is to improve the investment grade of the asset pool. The credit enhancements (1) allow the issuer of the security to obtain a credit quality above that of the asset pool and subsequently a higher credit rating than the originator; and (2) increase the likelihood that investors will receive the cash flows that the payment streams represent, in turn allowing the originator to receive a higher price for its payment streams. If the purchaser requires additional security, the originator may assign its rights under any surety bonds it has obtained to enhance the credit rating of the asset pool. *Id.*

³¹ Shenker & Colletta, *supra* note 30, at 1429.

³² See *In re Commercial Money Ctr., Inc.*, 350 B.R. at 469.

³³ Cf. Letter from James S. Cochran, Co-Chair, U.C.C. Comm. of the Bus. Law Section of the State Bar of Cal., to the Permanent Editorial Bd. for the U.C.C., app. 1, at 1-2 (Nov. 5, 2006), available at <http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/ucc/ucc-letter-to-peb.pdf> (last visited Jan. 22, 2010). Very often, a bankruptcy remote entity known as a special purpose vehicle (SPV) or a special purpose entity (SPE) is utilized by the originator of the leases. *Id.* The pooled assets are sold to the SPV, which is usually established as a bankruptcy-remote entity that exists solely for the purpose of issuing the payment stream-backed securities. *Id.* For example, in *Commercial Money Center*, approximately twenty-five percent of the transactions used an SPV to securitize the pools of payment streams. *Id.* at 2 n.3.



Problems in these transactions invariably surface when the originator/issuer acting as the servicer enters bankruptcy and a special purpose vehicle was not utilized. If a financier failed to perfect its interest by filing, it may find itself in the unenviable position of an unsecured creditor.³⁴ If the bankruptcy trustee deems the financier's interests in the pooled assets and/or payment streams to be unperfected, it will likely argue that any such payments to the financier are avoidable using its strong-

³⁴ An unsecured creditor is an individual or institution that lends money without obtaining specified assets as collateral. See BLACK'S LAW DICTIONARY 1539 (6th ed. 1990) (defining "unsecured debt"). There is a higher risk to the creditor in the event of the debtor's default because the loan is not backed by any tangible assets, and the unsecured creditor may be forced to solely accept proceeds from the liquidation of the debtor in full satisfaction of any amount owing to it.

arm powers.³⁵ The financier then must argue that it perfected in some other fashion (automatically or through possession) or face classification as an unsecured creditor.³⁶

B. Differentiating Among Chattel Paper, Payment Intangibles and Accounts

If stripped payment streams under equipment leases meet the definition of “chattel paper,”³⁷ any party acquiring an interest therein would be required to perfect its interest by either filing a financing statement³⁸ or taking possession of the underlying leases.³⁹ If the payment streams, having been stripped from the underlying leases, are classified not as “chattel paper,” but as “payment intangible[s],”⁴⁰ perfection is automatic upon sale.⁴¹ Since the primary issue is one of definition, courts analyzing the issue under Article 9, as well as courts analyzing similar cases under pre-revision Article 9, typically claim to rest their decisions on the plain language of the statutory text,⁴² even though courts reviewing the same statutory text have divined diametrically opposite interpretations of its meaning.⁴³

³⁵ See *In re Commercial Money Ctr., Inc.*, 350 B.R. at 472 (citing 11 U.S.C. §§ 544(a), 550, 551 (2006)).

³⁶ In *Commercial Money Center*, for example, the trustee attempted to preemptively defeat any alternative claim by NetBank that it obtained possession or constructive possession of the equipment leases or other related documents. See *id.* at 486.

³⁷ See *supra* note 21 and accompanying text.

³⁸ See U.C.C. § 9-312(a) (2005) (“[Perfection by filing permitted.] A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.”).

³⁹ See *id.* § 9-313(a) (“[Perfection by possession or delivery.] . . . [A] secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral.”).

⁴⁰ See *supra* note 20 and accompanying text (defining “payment intangible”).

⁴¹ See § 9-309(3) (applying to the “sale of a payment intangible”).

⁴² See *Kipperman v. NetBank FSB (In re Commercial Money Ctr., Inc.)*, 56 U.C.C. Rep. Serv. 2d (CBC) 54, 58 (Bankr. S.D. Cal. 2005) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). In *Ron Pair Enterprises*, the Court noted that no judicial investigation into the intentions of the statute or its legislative history is appropriate unless “a literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

⁴³ Compare *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 59-61 (analyzing Article 9 definitions to determine that stripped payment streams fit within the definition of “chattel paper”), with *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 475 (B.A.P. 9th Cir. 2006) (analyzing Article 9 definitions in determining

1. Statutory Interpretation and Official Comments

Under Article 9, collateral must possess three characteristics to be classified as chattel paper.⁴⁴ The collateral must (1) be a record;⁴⁵ (2) evidence a monetary obligation;⁴⁶ and (3) evidence a security interest in or a lease of specific goods.⁴⁷ In regard to the lease documents underlying the stripped payment streams, there is usually little doubt that the three elements of chattel paper are met.⁴⁸ However, the analysis for the treatment of stripped payment streams has not been as clear. The focus of the court in every case has been first on the text of Article 9,⁴⁹ even though that focus has yet to yield a clear resolution in case law.⁵⁰

The crux of the issue is whether a stripped payment stream, standing alone, meets the definition of chattel paper. The second element of chattel paper, a record “evidenc[ing] . . . a monetary obligation,”⁵¹ has caused the courts consternation.⁵²

that stripped payment streams are not “chattel paper” but fit more properly within the definition of “payment intangibles”).

⁴⁴ See *supra* note 21 (defining “chattel paper”).

⁴⁵ § 9-102(a)(69) (“Record” . . . means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.”).

⁴⁶ See *id.* § 9-102(a)(11) (a “monetary obligation” means a monetary obligation secured by the goods or owed under a lease of the goods”).

⁴⁷ *Id.*

⁴⁸ See, e.g., *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 60 (noting both parties’ concession that the elements of chattel paper had been met for the underlying leases).

⁴⁹ See generally *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 475-76 (B.A.P. 9th Cir. 2006) (analyzing the definitions in Article 9 and noting that the plain language of a statute is usually conclusive); *Houston v. Eiler (In re Cohen)*, 305 B.R. 886, 893 (B.A.P. 9th Cir. 2004) (stating that courts have not deferred to legislative history “in the face of plain . . . statutory language”); *U.S. Claims, Inc. v. Flomenhaft & Cannata*, 519 F. Supp. 2d 515, 521-23 (E.D. Pa. 2006) (commencing its analysis with the language of Article 9 definitions).

⁵⁰ See *Frisch, supra* note 6, at 9 n.35 (comparing the testimony of Professor Charles W. Mooney, arguing that Article 9 “does not state that a sale of any right evidenced by the chattel paper carries with it the chattel paper itself,” with the declaration of Professor Steven L. Harris, arguing that “rights to payment evidenced by chattel paper . . . including the right to payment of some or all of the rent under a lease, continue to be classified as chattel paper”) (citation omitted).

⁵¹ § 9-102(a)(11).

⁵² See generally *In re Commercial Money Ctr., Inc.*, 350 B.R. at 465; *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 54.

By relying on canons of statutory construction,⁵³ the bankruptcy court in *Kipperman* attempted to avoid a direct confrontation with the definitional problem and held that the collateralized payment streams were chattel paper under Article 9.⁵⁴ Characterizing a monetary obligation separated from the underlying lease as a payment intangible, the court reasoned, “does not follow from the plain language of the statutory definition of chattel paper,” since “such a reading would essentially delete the monetary obligation requirement from the definition.”⁵⁵ Or, as one famous commentator describing an analogous situation with promissory notes and accompanying mortgages put it, “The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow.”⁵⁶ Because the statutory text at issue is so brief, the question of whether stripped payment streams fall within the definition of chattel paper is difficult to resolve without referring to the comments.

In reviewing issues of Article 9 interpretation, courts have recognized that the comments are persuasive authority, even though they may not be dispositive.⁵⁷ However, the comments do not directly address the classification of payment streams, and even those comments cited in prior cases in support of defining stripped payment streams as chattel paper do so only in-

⁵³ *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 59 (citing NORMAL J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, §§ 47:23-25 (6th ed. 2000)) (“A canon of statutory construction is that a definition which declares what a term ‘means’ excludes any meaning that is not stated.”). Article 9 limits the scope of the definition of “chattel paper” by utilizing the term “means.” § 9-102(a)(11).

⁵⁴ *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 60.

⁵⁵ *Id.*

⁵⁶ Frisch, *supra* note 6, at 19 (quoting Professor Chester Smith as reported in *Best Fertilizers of Ariz., Inc. v. Burns*, 571 P.2d 675, 676 (Ariz. Ct. App. 1977), *rev’d on other grounds*, 570 P.2d 179 (Ariz. 1977)).

⁵⁷ The Official Comments cited herein are references to the official reporters’ comments to Article 9. If there is ambiguity or uncertainty regarding certain provisions of the U.C.C., the courts often look to the Official Comments for general guidance. See *In re Wiersma*, 283 B.R. 294, 300 (Bankr. D. Idaho 2002) (stating that if the plain language of Article 9 does not resolve a dispute, the Official Comments provide guidance to the courts), *aff’d in part, rev’d in part on other grounds* 483 F.3d 933 (9th Cir. 2007); *Peregrine, Inc. v. Capitol Fed. Sav. & Loan Ass’n of Denver (In re Peregrine Entm’t. Ltd.)*, 116 B.R. 194, 198 n.3 (C.D. Cal. 1990) (stating that “although legislative history generally is a poor source of guidance for statutory interpretation, official commentaries are persuasive”).

ferentially.⁵⁸ Nevertheless, courts have found several of the comments to Article 9 to be persuasive on this point.⁵⁹

Comment 5 to section 9-109, "Transfer of Ownership in Sales of Receivables," states, "A 'sale' of . . . chattel paper . . . includes a sale of a right in the receivable"⁶⁰ The bankruptcy court's decision in *Kipperman* cited this language as the basis for the court's conclusion that the payment stream cannot be separated from the underlying instrument.⁶¹ This comment appears to support the theory of the indivisibility of this class of asset, but it does not solve the definitional problem. By suggesting that stripped payment streams are indivisible from the underlying leases, the comment moderately supports their characterization as chattel paper. However, the comment neither directly addresses nor precludes a prior transfer of the payment streams. It simply states that if chattel paper is sold, it would include the right to payment. Unfortunately, the comment does not address nor foresee any uniform treatment of prior transfers of payment streams. The comment may buttress the bankruptcy court's decision, but if the payment streams themselves are better defined as payment intangibles, the comment is little more than a tautology that fails to address the issue.

A similar argument can be found in comment 2 to section 9-313. This comment provides that "[a] security interest in accounts and payment intangibles—property *not* ordinarily represented by any writing whose delivery operates to transfer the right to payment—may under this Article be perfected only by filing."⁶² The inference is that collateral that *is* ordinarily represented by a "writing whose delivery operates to transfer the right to payment"⁶³ (for example, a lease), cannot be an account

⁵⁸ See U.C.C. §§ 9-109 cmt. 5, 9-102 cmt. 5(d), 9-313 cmt. 2 (2005); see also *infra* notes 60-68 and accompanying text.

⁵⁹ *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 61-62 (citing §§ 9-109 cmt. 5, 9-312 cmt. 2, 9-102 cmt. 5(d), and *Gray v. Jefferson Loan & Inv. Bank (In re Commercial Mgmt. Serv., Inc.)* 127 B.R. 296, 300-02 (Bankr. D. Mass. 1991)).

⁶⁰ § 9-109 cmt. 5. The full comment reads: "A sale of an account, chattel paper, a promissory note, or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest." *Id.*

⁶¹ *Kipperman*, 56 U.C.C. Rep. Serv. 2d (CBC) at 61.

⁶² § 9-313 cmt. 2 (emphasis added).

⁶³ *Id.*

or payment intangible, and therefore cannot avail itself of the benefits of automatic perfection. However, this comment and section 9-313 itself was provided to deal with the issue of perfecting a security interest by possession.⁶⁴ This comment specifically addresses accounts and payment intangibles only because "delivery" is typically impossible for such asset classes under the common understanding of the term as they are not manifested in a tangible, deliverable form.⁶⁵ The comment provides practical, not definitional, guidelines with respect to perfecting an interest by possession. The comment is better read as excluding accounts and payment intangibles entirely from the scope of section 9-313. This interpretation is borne out by the comment's conclusion that "*exempted* assignments [of payment intangibles and accounts] are perfected when they attach," which in the case of payment intangibles, occurs automatically.⁶⁶

Comment 5(d) to section 9-102 (the definitional section for "General Intangible" and "Payment Intangible") further states that "[e]xamples [of general intangibles] are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument."⁶⁷ This comment can be read to imply that characterization as a payment intangible would be improper for collateral that is "ordinarily represented by any writing such as [sic] . . . underlying leases"⁶⁸ because the fractionalized payment stream obligations are indeed evidenced by chattel paper. The problem with this interpretation is that the exclusionary language applies only to "the right to payment of a loan of funds."⁶⁹ In the case of a true sale, the only instance in which perfection is automatic for payment intangibles,⁷⁰ the right to the funds from the payment streams does not arise from a loan of funds.

⁶⁴ See LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 324 (5th ed. 2006) (noting the inapplicability of perfection by possession for property that is incapable of being possessed).

⁶⁵ *Id.*

⁶⁶ § 9-313 cmt. 2 (emphasis added).

⁶⁷ See *id.* § 9-102 cmt. 5(d).

⁶⁸ See *Kipperman v. NetBank, FSB (In re Commercial Money Ctr., Inc.)*, 56 U.C.C. Rep. Serv. 2d (CBC) 54, 61 (Bankr. S.D. Cal. 2005).

⁶⁹ See § 9-102 cmt. 5(d).

⁷⁰ *Id.* § 9-309(3).

Additionally, it is widely understood that the 1999 revisions to Article 9 regarding payment intangibles were included as a concession to the banking industry, and were specifically meant to bring loan participations within the ambit of Article 9.⁷¹ While the intent to cover loan participations is clear, the final text of Article 9 makes no such distinction. In fact, the only mention of loan participations is illustrative.⁷² Initially, the drafters had hoped to solve the loan participation issue by limiting the parties to whom automatic perfection would be available.⁷³ However, the drafters were unable to find a definition of “financial institution” which was neither too broad, nor too limited.⁷⁴ Therefore, the resolution was to broaden the definition of account to include essentially all monetary obligations other than payment intangibles, which at the time were thought to include only loan participations.⁷⁵

One commentator argues that this history should govern Article 9 interpretations, as the stripped payment streams “do not fit within the limited purpose intended for payment intangibles.”⁷⁶ While the drafters likely did not intend to include stripped payment streams from equipment leases within the category of payment intangibles, the final text of Article 9 is unambiguous. The definition of payment intangible does not expressly limit coverage to loan participations.⁷⁷ Thus, based on the statutory text, the conclusion that stripped payment streams are not chattel paper is likely correct.

⁷¹ See Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167, 174-76 (1999); ROBERT S. SUMMERS & JAMES J. WHITE, WHITE & SUMMERS' HORNBOOK ON THE UNIFORM COMMERCIAL CODE § 22-5 (5th ed. 2000).

⁷² See § 9-101 cmt. 4(d) (“Certain sales of payment intangibles—*primarily* bank loan participation transactions—should not be subject to the Article 9 filing rules.”) (emphasis added).

⁷³ Shupack, *supra* note 71, at 176.

⁷⁴ See generally Dan Schechter, *Outright Sale of Payment Intangibles May be Automatically Perfected, but Sale that Allocates Credit Risk to Debtor May be Recharacterized as Disguised Loan*, 2006 COM. FIN. NEWSL., Sept. 6, 2006 at 68.

⁷⁵ *Id.*

⁷⁶ Anthony N. Kaim, Note, *Classifying the Right to Rental Payment Streams Stripped Off a Lease: An Examination of the Issues Not Discussed in Commercial Money Center*, 86 TEX. L. REV. 857, 881 (2008).

⁷⁷ See *supra* notes 72-73 and accompanying text.

If the payment streams are neither chattel paper nor accounts,⁷⁸ by process of elimination they would fall into the residual category of general intangibles⁷⁹ and then the more narrow definition of payment intangible, since “the [account] debtor’s principal obligation is a monetary obligation.”⁸⁰ This relatively simple classification appears to be the most apt under the plain language of the relevant statutory sections. Other commentators have endorsed this characterization,⁸¹ but the decision is not without criticism.⁸²

While the comments and some commentary provide snippets of anecdotal support to the proposition that stripped payment streams be treated as chattel paper, a comprehensive reading of Article 9 is rather inconclusive on the matter.⁸³ How-

⁷⁸ As an aside, payment streams may have been best characterized as an account, but for their express exclusion from that definition. See U.C.C. § 9-102(a)(2) (2005) (“The term does not include . . . rights to payment evidenced by chattel paper or an instrument . . .”). See also *infra* Part I.B.4.

⁷⁹ See § 9-102(a)(42) (defining general intangible).

⁸⁰ See *supra* note 20 (defining payment intangible).

⁸¹ See, e.g., *NetBank, FSB v. Kipperman* (*In re Commercial Money Ctr., Inc.*), 350 B.R. 465, 476 (B.A.P. 9th Cir. 2006) (citing 2 CLARK & CLARK, *supra* note 14, at ¶ 10.08[8][c] (criticizing the bankruptcy court’s decision at the trial level classifying payment streams as chattel paper and noting that “carved-out payment streams seem to fit the definition of ‘payment intangible’ like a glove”)).

⁸² See Kaim, *supra* note 76, at 880. The possibility of characterizing the payment streams as accounts is briefly discussed *infra* at Part I.B.3. That approach is problematic because, although functional as to the inner working of Article 9, such a classification is not borne out by the language of the statute. See *infra* notes 130-35 and accompanying text.

⁸³ *Kipperman v. NetBank FSB* (*In re Commercial Money Ctr., Inc.*), 56 U.C.C. Rep. Serv. 2d 54, 61 & n.4 (Bankr. S.D. Col. 2005) (citing Darlene R. Davis & Edward K. Gross, *Equipment Finance Leasing Documents and Article 9 of the Uniform Commercial Code*, in 1 EQUIPMENT LEASING—LEVERAGED LEASING § 3A:11.1 (Bruce Fritch, Albert Reisman & Ian Shrank, eds., 2001), *current version available at* <http://www.westlaw.com> (find citation “PLIREF-EQUIP s 3A:9.2”) (stating that where a lessor assigns, in full or in part, all or any of its rights under a lease, “then it is leveraging or assigning ‘chattel paper’”); Amelia H. Boss, *Lease Chattel Paper: Unitary Treatment of a “Special” Kind of Commercial Specialty*, 1983 DUKE L.J. 69, 87 (1983) (positing that Article 9 “considers the transfer of the right to payment under a lease to be chattel paper”); Julian B. McDonnell, *Tangible Chattel Paper: The Impact of Revised Article 9*, in 1D PETER F. COOGAN ET AL., SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 28.05[1], 28-32 n.2 (Matthew Bender 2003) (stating that the right to payments under a lease agreement “is not to be conceptualized as a general intangible”). See also *Gray v. Jefferson Loan & Inv. Bank* (*In re Commercial Mgmt. Serv., Inc.*), 127 B.R. 296, 305 (Bankr. D. Mass. 1991) (holding that the right to receive payments under an equipment lease can be chattel paper, and thus the security interest can be perfected upon possession); Kaim, *supra* note 76, at 878-80 (arguing that failure to analyze Article 9’s rules

ever, case law under pre-revision Article 9 justifies the treatment and interpretation of this type of collateral as chattel paper.⁸⁴ The clear problem with relying on such case law for precedential support, however, is that those decisions were rendered before the collateral classification of "payment intangible" ever existed.⁸⁵

2. Commercial Money Center and Pre-Revision Article 9 Case Law

a. *The Commercial Money Center Case*

Because the primary issue of classifying stripped payment streams is one of statutory construction, the plain language of the statute should govern if the text is not ambiguous. Prior to *Commercial Money Center*, courts had failed to provide detailed

regarding the right to payment following the collateral, as well as the drafters' intent in creating the payment intangible classification resulted in the erroneous classification of payment intangible rather than an account).

⁸⁴ See *In re Commercial Mgmt. Serv.*, 127 B.R. at 296 (holding under Rhode Island law that the right to receive payments under an equipment lease can be chattel paper, and thus the security interest is perfected upon possession). Although *Commercial Management* was decided prior to revised Article 9 and in the Federal District of Massachusetts, the bankruptcy court hearing *Kipperman* found that case persuasive given a similar fact pattern, legal issue, and the fact that the court did not believe the outcome in *Commercial Management* would have been any different under revised Article 9. *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 62. See also *In re Bennett Funding Group, Inc.*, 203 B.R. 30, 39 (Bankr. N.D.N.Y. 1996) (holding that perfection of an interest in chattel paper by filing also serves to perfect an interest in the identifiable proceeds of that chattel paper while declining to resolve whether perfection by possession of the chattel paper alone would also perfect an interest in the identifiable proceeds of that chattel paper). It should be noted, however, that the primary issues in *Bennett Funding* involved section 552 of the Bankruptcy Code and as such pitted the trustee against the alleged secured parties rather than a priority dispute between secured creditors. *Id.* at 38. It should also be noted that among the cases cited in *Commercial Management*, two support, at least indirectly, the characterization of a stripped lease payment as a payment intangible, but in both cases, the rulings were deemed irrelevant as they dealt with non-Article 9 issues. See *FDIC v. W. Hugh Meyer & Assocs., Inc.*, 864 F.2d 371, 375 (5th Cir. 1989) (holding, under the provisions of Article 8 of the U.C.C., that because possession was essential under Texas law to obtain a secured interest, a third-party assignee of pledged stock had priority over a bank (who never obtained possession) to whom a security interest in the stock had previously been granted); *Repp v. Sabre Farms, Inc. (In re Sabre Farms, Inc.)*, 27 B.R. 532, 536 (Bankr. D. Or. 1982) (holding, in the case of real estate interests, that "[t]he right to receive rent under a lease of land is a general intangible").

⁸⁵ See U.C.C. § 9-101 cmt. 4(a). (noting that former Article 9 did not include sales of payment intangibles within its purview).

support for their analysis in defining payment obligations under a lease as chattel paper.⁸⁶ Therefore, the crux of the definitional question remains whether payment streams stripped from the underlying leases are simply records that evidence monetary obligations, or are indeed monetary obligations themselves.

The bankruptcy court in *Kipperman* characterized the underlying payment streams as chattel paper while the B.A.P. characterized the payment streams as payment intangibles, both seemingly based on the plain language of the statute.⁸⁷ As a result, the decisions are entirely incompatible as well as imperfect for a number of reasons. The first failed to grapple with the essence of the issue—whether the underlying payment streams themselves meet the definition of chattel paper.⁸⁸ The second decision likely properly classified the collateral as a payment intangible, but noted that its decision had the potential to create ambiguities in areas of settled law regarding priority and perfection issues, and sale versus loan issues.⁸⁹

The bankruptcy court reasoned that chattel paper was the proper classification because defining payment streams as payment intangibles “would essentially delete the monetary obligation requirement from the definition [of chattel paper].”⁹⁰ This reasoning, however, only obfuscates the central issues in defining “chattel paper”—whether stripped payment streams are “records” that (1) evidence a monetary obligation, and (2) are a lease of specific goods.⁹¹ The statement by the bankruptcy court erroneously misconstrues the language of the definition of chattel paper. Instead of reading the latter clauses of the definition (i.e. “evidencing a monetary obligation,” and “a lease of specific goods”) as modifiers of the type of record at issue, it sees the stripping of payment streams as an end-run around the statutory requirement of a monetary obligation. That is not the case. Any record meeting the definitional requirements of chattel pa-

⁸⁶ See *infra* note 107 and accompanying text (noting the *Commercial Management, Bennett Funding Group*, and *In re Leasing Consultants* cases).

⁸⁷ See *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 64; *NetBank*, 350 B.R. at 476.

⁸⁸ See *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 61.

⁸⁹ See *In re Commercial Money Ctr., Inc.*, 350 B.R. at 478-80.

⁹⁰ *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 60.

⁹¹ See *supra* notes 46-48 and accompanying text (noting that the required records are those that “evidence both a monetary obligation, and a . . . lease of specific goods”).

per, which would necessarily include a monetary obligation, will continue to constitute chattel paper.

Reversing the bankruptcy court's decision, the B.A.P. in *Commercial Money Center* held that severed pieces of underlying chattel paper are not chattel paper themselves solely because they are derived from chattel paper.⁹² The court reiterated its opinion that, while delivery of chattel paper may transfer a perfected interest in the payment streams,⁹³ the streams themselves are not chattel paper.⁹⁴ From the time of the decision, commentators have both praised⁹⁵ and condemned⁹⁶ the decision. However, even among the dissenters, the common criticism is not improper analysis of the statutory language, but rather the commercial effects of the decision.⁹⁷

While the B.A.P.'s decision in *Commercial Money Center* was founded on statutory analysis like the bankruptcy court before it, the B.A.P. sought additional support for its conclusion. After first examining and then discarding the cases cited as precedential by the bankruptcy court, the B.A.P. noted that prior case law did not compel a decision that payment streams be classified as chattel paper.⁹⁸ The B.A.P. also reviewed its interpretation of payment streams against the policies of predictability in financial transactions.⁹⁹ The B.A.P. did not believe there was an actual conflict between its decision and those policies.¹⁰⁰

⁹² *In re Commercial Money Ctr.*, 350 B.R. at 478 ("Certainly if you sell a piece of chattel paper, it does come with all the rights that are thereunder. But the flip side of that is not true. If you buy some of the pieces under the chattel paper (i.e. the payment streams), it doesn't mean that you're getting the chattel paper as well.") (citing Transcript of Record at 50:13-17, *Kipperman*, 56 U.C.C. Rep. Serv. 2d 54 (No. 02-09721-H7).

⁹³ U.C.C. § 9-313(a) (2005).

⁹⁴ *In re Commercial Money Ctr.*, 350 B.R. at 478.

⁹⁵ See e.g. 2 CLARK & CLARK, *supra* note 14, at ¶10.08[8][b], [e].

⁹⁶ Even co-reporters of Revised Article 9 took opposing positions as to the proper characterization of the collateral. See Frisch, *supra* note 6, at 4 (citing *In re Commercial Money Ctr.*, 350 B.R. at 467, 480 n.12).

⁹⁷ *Id.* at 19 (stating that "if there are [benefits to be gained from stripping], they have yet to be presented in convincing fashion"); see also Schwarcz, *supra* note 9, at 277 (arguing that the inability to determine ownership priority lessens the value of such instruments when sales do take place).

⁹⁸ See *In re Commercial Money Ctr.*, 350 B.R. at 476-79.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

As to future concerns arising out of this interpretation, the court held that it was the role of the court to interpret, not redraft.

At the end of the day, the B.A.P. was simply unwilling to re-interpret the text of the statute to fit what was argued as its intended purpose.¹⁰¹ After analyzing the plain language, comments, and case law, the *Commercial Money Center* court held that "[the underlying payment streams] are not 'records' that 'evidence' monetary obligations, they *are* the monetary obligations."¹⁰² Therefore, the payment streams must be payment intangibles regardless of the intent of the drafters or the stated purposes of Article 9. As noted in Part I.B.1, however, cases decided prior to the revisions to Article 9 tend to disagree.

b. Case Law Under Pre-Revision Article 9

Prior to revised Article 9 (and its creation of payment intangibles with automatic perfection), courts grappled with the treatment of collateral such as payment streams and generally decided to treat it as chattel paper in light of their interpretation of the purposes of Article 9.¹⁰³ In one such case, *In re Commercial Management Service*, an equipment provider stripped payment streams from the underlying equipment leases and sold the right to collect the future lease payments to a third-party financial institution.¹⁰⁴ The specific issue in *Commercial Management* was whether a right to receive a payment stream severed from the underlying lease was an interest that could be shown and perfected by possession of chattel paper.¹⁰⁵ The *Commercial Management* court noted that although pre-revision Article 9 did not explicitly provide for such an outcome:

Taking possession of the collateral, the chattel paper itself, would be meaningless unless the paper represented the underlying rights which were transferred by a transfer of the paper. Therefore, the necessary implication of section 9-305 is that

¹⁰¹ *Id.* at 477.

¹⁰² *See generally id.* at 465.

¹⁰³ *See supra* note 12 and accompanying text (noting purposes of Article 9).

¹⁰⁴ *See Gray v. Jefferson Loan & Inv. Bank (In re Commercial Mgmt. Serv., Inc.)*, 127 B.R. 296, 298-99 (Bankr. D. Mass. 1991).

¹⁰⁵ *Id.* at 302.

delivery of chattel paper operates to transfer the claim that the paper represents.¹⁰⁶

The *Commercial Management* court went on to note, as have subsequent courts,¹⁰⁷ “[A] lease is treated as the embodiment of the rights it represents such that these rights are transferred by a transfer of the lease document.”¹⁰⁸ This holding states that certain property, represented by a writing whose delivery transfers the right to payment, is indivisible from the right to receive payment thereunder. As such, it provides the strongest support for disallowing the separation of payment streams from the leases in the first instance.

However, unlike the straightforward analysis used to determine whether certain tangible instruments are chattel paper, courts undertake an additional step in determining whether the right to the payments due under such instruments would likewise be considered chattel paper.¹⁰⁹ Courts rely upon inferences from other sections of Article 9 to provide the final analysis in characterizing stripped rights to lease payments as chattel pa-

¹⁰⁶ *Id.* (quoting Boss, *supra* note 83, at 92-93).

¹⁰⁷ In *Bennett Funding*, an equipment provider was engaged in the commercial leasing of copy machines and office equipment. *In re Bennett Funding Group, Inc.*, 203 B.R. 30, 32 (Bankr. N.D.N.Y. 1996). The equipment lessor bundled the leases into portfolios, which it then sold to third parties. *Id.* The issue of whether leases are chattel paper has already been answered in the affirmative in numerous cases. See, e.g., *id.* at 30; *In re Commercial Mgmt. Serv.*, 127 B.R. at 296; *Feldman v. First Nat'l City Bank (In re Leasing Consultants, Inc.)*, 486 F.2d 367, 370 (2d Cir. 1973). *Bennett Funding*, however, was mainly concerned with whether the leases themselves were chattel paper or general intangibles. *In re Bennett Funding Group*, 203 B.R. at 33. The distinction between the payment streams and the leases came up only when the court noted that chattel paper “in this case consists of individual leases of equipment and the monetary obligation payable at some time in the future.” *Id.* at 38. This additional distinction was added solely because the court analyzed certain Bankruptcy Code provisions that differentiated between chattel paper and proceeds. See 11 U.S.C. §§ 544, 552 (2006) (allowing the bankruptcy trustee to avoid unperfected security interests and governing whether a prepetition security interest would extend to the payments received by a bankruptcy trustee post-petition respectively). It was not used in resolving the initial definitional issue, nor does it help resolve the issue of the treatment of payment intangibles. *In re Bennett Funding Group*, 203 B.R. at 38.

¹⁰⁸ *In re Commercial Mgmt. Serv.*, 127 B.R. at 302 (quoting Boss, *supra* note 83, at 92-93).

¹⁰⁹ See generally *In re Commercial Mgmt. Serv.*, 127 B.R. at 299-303; see also *Kiperman v. NetBank FSB (In re Commercial Money Ctr., Inc.)*, 56 U.C.C. Rep. Serv. 2d 54, 61 (Bankr. S.D. Col. 2005).

per.¹¹⁰ Most frequently cited, unsurprisingly, are those sections involving the definitions of "intangibles" and "chattel paper," as well as "accounts."¹¹¹

Pre-revision Article 9 decisions generally upheld the classification of payment rights under leases as chattel paper, ruling that the existence of a writing "usually transforms [the right to the underlying payment] into chattel paper."¹¹² In these cases, courts made the essential inference that because the drafters of Article 9 included leases in the definition of chattel paper, their intent on the treatment of leases was clear. "[T]he necessary implication . . . is that delivery of chattel paper operates to transfer the *claim* that the [chattel] paper represents."¹¹³ Under this reasoning, possessors of the underlying leases would have priority over non-possessors in the payment streams, presumably due to section 9-330.¹¹⁴

Yet, the definitional process is incomplete under this line of reasoning, and it fails to answer the fundamental underlying question—whether an interest in the payment streams of a lease should be considered chattel paper. The incompleteness comes from the conclusion that, because leases are chattel paper, and since the transfer of chattel paper serves as a transfer of the underlying interest in the chattel paper, the transfer of the underlying interest must also be chattel paper. However, this conclusion is not necessarily correct. First, recent cases have upheld the transfer of chattel paper without the underlying interest. Second, there is no definition or connection that

¹¹⁰ See *In re Commercial Mgmt. Serv.*, 127 B.R. at 303-04; *Kipperman*, 56 U.C.C. Rep. Serv. 2d at 62-63 (paraphrasing or inserting entirely the holding of *Commercial Management*).

¹¹¹ U.C.C. § 9-102(a)(2) (2005). Account means "a right to payment of a monetary obligation . . . for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of . . . [which] does not include . . . rights to payment evidenced by chattel paper or an instrument." *Id.* Pre-revision U.C.C. section 9-106, used by the Court in *Commercial Management*, provided a similar but slightly different definition of account: "any right to payment for goods sold or leased . . . which is not evidenced by an instrument or chattel paper." Pre-Revision U.C.C. § 9-106 (1999).

¹¹² *In re Commercial Mgmt. Serv.*, 127 B.R. at 303; see also § 9-102(a)(2). The definition of "account" would encompass payments due under chattel paper except for the express exclusion. *In re Commercial Mgmt. Serv.*, 127 B.R. at 303.

¹¹³ *Id.* at 302. (emphasis added).

¹¹⁴ See § 9-330(a), (b) (providing rules governing the priority of claims for purchasers of chattel paper).

requires treatment of an underlying interest in chattel paper to also be considered chattel paper.

Returning to the simple analogy in the introduction: if you sell a car, you usually (though not always) sell the motor as part of the car; but if you sell the motor, you do not necessarily sell the entire car. Therefore, while some courts and commentators have concluded that Article 9 “considers the transfer of the right to payment under a lease to be chattel paper,”¹¹⁵ the fact that a writing exists without more should be insufficient to define the collateral at issue as chattel paper if it fails to satisfy all the definitional requirements under Article 9.

3. The Importance of Predictability, and the Purpose of Article 9

As noted above, the stated purpose of Article 9 is to provide predictability and security in commercial transactions.¹¹⁶ Both the bankruptcy court and the B.A.P. in *Commercial Money Center* declined to classify the transactions at issue as *sales* of payment intangibles.¹¹⁷ Both courts hoped to avoid future priority claims as well as disputes over whether specific transfers of stripped payment streams were sales,¹¹⁸ which get automatic perfection, or secured loans, which do not.¹¹⁹ For purposes of predictability, the designation of the payment streams as chattel paper is preferable due to the ease and consistency of treatment. However, in regard to the definitions provided in Article 9, the proper characterization of the underlying payment streams is likely payment intangible.

¹¹⁵ *In re Commercial Mgmt. Serv.*, 127 B.R. at 303 (citing Boss, *supra* note 83, at 92-94).

¹¹⁶ See *supra* note 12 (citing pre-revision Article 9's statement of purpose).

¹¹⁷ The distinction between a sale and loan in cases dealing with payment intangibles is of paramount import as automatic perfection may hinge on the final decision. See *infra* Part I.C.

¹¹⁸ *Kipperman v. NetBank FSB (In re Commercial Money Ctr., Inc.)*, 56 U.C.C. Rep. Serv. 2d 54, 64 (Bankr. S.D. Col. 2005) (stating that “to include the right to payment under chattel paper in the definition of payment intangibles would lead to endless debates over whether particular factoring transactions are true sales or, in substance, secured loans”) (citing Trustee's Mem. of Points and Authorities in Opp'n to Mot. for Partial Summ. J. at 36:2-3, *In re Commercial Money Ctr., Inc.*, 56 U.C.C. Rep. Serv. 2d. 54 (No. 85)).

¹¹⁹ *Id.*

If in fact stripped payment streams are better classified as payment intangibles under the current language of section 9-102, one of the primary concerns must be the hidden priorities which may arise due to automatic perfection.¹²⁰ The problems with predictability arise in the context of competing secured interests. Under section 9-330(b), a purchaser of chattel paper can protect its interest *in the chattel paper* as against other interests in that same chattel paper by taking possession of it,¹²¹ whether the leases are assigned as a security for a loan or sold outright.¹²² However, the priority rule in section 9-330(b), if read strictly, applies only to "a security interest *in the chattel paper*."¹²³ If the interest in the payment streams is deemed a payment intangible and not chattel paper, the priority rules in section 9-330(b) would appear to be inapplicable to security interests in payment intangibles which are automatically perfected. By definition then, the section 9-330(b) superpriority statute deals with interests in chattel paper, not with interests in payment intangibles.¹²⁴

If *Commercial Management* was correctly decided and rights to rental payments could be evidenced and perfected by possession of chattel paper, an assignment of an interest in chattel paper should still include the associated payment

¹²⁰ NetBank, FSB v. Kipperman (*In re Commercial Money Ctr., Inc.*), 350 B.R. 465, 479 (B.A.P. 9th Cir. 2006). The B.A.P. in *Commercial Money Center* recognized these hidden priorities as problematic, but declined to address the issue as it was not yet ripe. *Id.* at 480. The court noted, "We are not persuaded that the plain meaning of the statute conflicts with [the policies of certainty in financial transactions and the ability to discover competing interests], or alternatively that it is our role to rewrite the statute if there is any such conflict." *Id.* at 477.

¹²¹ U.C.C. § 9-330(b) (2005) (emphasis added) ("A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.").

¹²² The scope of Article 9 includes both and does not differentiate in its treatment of the two. See *id.* § 1-201(b)(30) (noting that the term "purchaser" includes a secured lender). A purchaser, defined as a person that takes by purchase, includes taking by, *inter alia*, a pledge, lien, or security interest. *Id.* § 1-201(b)(29).

¹²³ See *supra* note 121 (emphasis added).

¹²⁴ § 9-330(b).

streams as long as they have not been previously stripped.¹²⁵ Furthermore, any non-stripped interest in the payment streams would be deemed an interest in the investor's chattel paper, and under the priority rules of section 9-330(b), lenders would have the predictability sought.¹²⁶ However, if the payment streams had been stripped and sold prior to the sale or assignment of an interest in the chattel paper, the interest in the chattel paper would be junior to the automatically perfected interest in the payment streams.¹²⁷ Therefore, regardless of the correctness of doing so, commercial uncertainty results from treating payment streams as payment intangibles. While revised Article 9 may have created payment intangibles primarily to deal with loan participations,¹²⁸ neither the statute nor the comments exclude stripped payment streams from such coverage. Consequently, a proper interpretation of Article 9 leads to more commercial uncertainty rather than less.

4. Accounts

True leases are much more similar to accounts than to chattel paper.¹²⁹ Nevertheless, leases are not accounts because they are expressly excluded from the definition of account in Article 9.¹³⁰ As mentioned above, revised Article 9 broadened

¹²⁵ See, e.g., *Gray v. Jefferson Loan & Inv. Bank (In re Commercial Mgmt. Serv. Inc.)*, 127 B.R. 296, 303-06 (Bankr. D. Mass. 1991).

¹²⁶ *Id.*

¹²⁷ See Schecter, *supra* note 74, at 71 (noting that, although the issue is murky, the decision reached by the *Commercial Money Center* court is probably "fundamentally right").

¹²⁸ See WHITE & SUMMERS, *supra* note 71, at §22-5 (banks demanded automatic perfection for loan participations because they were inherently controlled by limited numbers in the marketplace, as well the correlating unnecessary cost and burden involved with perfecting their interests therein).

¹²⁹ See Boss, *supra* note 83, at 86-90 (noting that rights to payments under a lease meets the statutory definition of account but for the proviso that any such right to payment evidenced by an instrument or chattel paper is by definition excluded from being so defined; although the fact that a lease is in writing does not, by itself, distinguish it from an account which may also be embodied in a writing). The drafters' intent in excluding leases from the definition of account was to unify Article 9's treatment of leases, whether they be true leases or security leases in order to remedy any problems in dealing with disguised conditional sales. *Id.* at 88-89.

¹³⁰ *In re Commercial Mgmt. Serv.*, 127 B.R. at 303. The right to receive payments separated from an underlying lease appears to satisfy the necessary criteria (the right to payment of a monetary obligation for property that has been leased) to be characterized

the scope of "account" to include nearly every monetary obligation, but specifically excluded rights to payment "evidenced by chattel paper."¹³¹ One commentator has argued that it is disingenuous to disqualify stripped payment streams from the definition of account based on the chattel paper exclusion.¹³² While the argument is unique, and based more on purpose than language,¹³³ it is easily dispatched. The argument for including stripped payment streams within the definition of account either misstates or misconstrues the applicable statutory language. The exclusion within the definition for "account" is for a "right to payment evidenced by chattel paper."¹³⁴ A payment stream is exactly that—a right to receive payment derived from the lease. This analysis is entirely distinct from a determination that the payment stream itself is a record evidencing a monetary obligation. The only way to arrive at the conclusion that stripped payment streams are more properly deemed accounts is to equate "rights to payment evidenced by chattel paper" with a "record . . . that evidence[s] . . . a monetary obligation."¹³⁵ Based on a plain language set forth in the preceding sentence, these two items are easily differentiable on both a definitional and functional basis.

as an account. *Id.* Another commentator has argued that, if stripped payment streams are not characterized as chattel paper, the proper classification should be accounts. See Kaim, *supra* note 76, at 880.

¹³¹ U.C.C. § 9-102(a)(2) (2005); see Steven O. Weise, *An Introduction to Revised U.C.C. Article 9*, 70 PENN. B. ASS'N. Q. 158, 159 (Oct. 1999) (noting that revised Article 9 broadened the definition of "accounts" to include payment obligations arising out of credit card receivables as well as those arising out of the sale, lease, or license of many types of tangible and intangible property).

¹³² See Kaim, *supra* note 76 at 880 ("[I]t is contradictory to maintain both that the payment stream is not evidenced by chattel paper and also that the payment stream cannot be an account solely because it is 'evidenced by chattel paper.'").

¹³³ *Id.* at 879 (restating the drafters' intent to broaden the scope of accounts while limiting the reach of payment intangibles).

¹³⁴ See § 9-102(a)(2).

¹³⁵ *Id.*; see also § 9-102(a)(11).

C. Form v. Substance—A Short Note Regarding the Classification of a Stripped Payment Stream and What It Means Going Forward (Sale v. Loan)

Because automatic perfection of a security interest in a payment intangible under section 9-309 applies only to a true sale, it is critical to determine whether the transaction between the lessor/originator and the financier/purchaser is indeed a sale or merely a loan. While parties may attempt to draft their documents to conform to certain notions of a sale or a loan as the case may be, the clear implication from prior cases is that the identity of such documents is ultimately determined by the courts based on the substance of the transaction.¹³⁶

If a stripped payment stream is properly classified as a payment intangible, the next question is whether the transfer of that payment intangible was a sale or a loan.¹³⁷ If the transaction is not a sale, the rule of automatic perfection will not apply.¹³⁸ Practically speaking, this means that parties can attempt to manipulate such outcomes in the drafting of the transactional documents. By characterizing a transaction as a sale, the parties may expect to obtain the benefits of automatic perfection. Conversely, by characterizing the transaction as a secured loan, the parties can assure that any perfection of a security interest must be obtained through possession or filing assuming that their characterizations are correct. Regardless of the determination, this is an issue that cannot be resolved solely by resorting to statutory language, but rather is dependent on the facts of the specific case. As such, even careful drafters may receive unexpected outcomes if a fact-finder disagrees with the purported characterization of the transaction.

¹³⁶ See 2 CLARK & CLARK, *supra* note 14, at ¶ 10.08[8][e] (stating the recent decision “remains an important precedent on the factors that courts should consider in determining whether the transaction is a loan or a sale”). Cf. Kaim, *supra* note 76, at 863 (noting that some states have enacted so-called true-sale laws that would attempt to give primacy to the label the parties give to the transaction).

¹³⁷ See Schechter, *supra* note 74, at 69-71 (noting that automatic perfection may depend on the issue of whether or not a transaction is a true sale versus a disguised loan).

¹³⁸ § 9-309 (noting that a security interest in the “sale of a payment intangible” is automatically perfected) (emphasis added).

II. COMPETING PRIORITIES AND MARKET INEFFICIENCIES

A. Relative Priorities and Interrelationships Among Competing Interests in Collateral or Interests in Separate Collateral

1. Competing Priorities and Phantom Competitors

Arguably, the primary problem in classifying stripped payment streams as payment intangibles is the ambiguity in priority between a buyer of the stripped payment stream and a subsequent purchaser of the underlying chattel paper.¹³⁹ Priority conflicts where a party has taken possession of the chattel paper are resolved under U.C.C. section 9-330, known as the “super-priority” rule.¹⁴⁰ Generally, conflicting priorities *in* the chattel paper are resolved by temporality or possession,¹⁴¹ while conflicts between interests in the chattel paper and its proceeds are governed by section 9-322.¹⁴² However, if the stripped payment streams are deemed to fall outside of section 9-330 because the purchaser’s interest is not “*in* the chattel paper which is claimed,”¹⁴³ there may be no good answer within Article 9 for how to treat any subsequent conflict as between an interest in chattel paper and one in a payment intangible.¹⁴⁴

Whether or not such payment streams fall outside of Article 9 is still very much open to debate. One of the reporters of Article 9 posited that sections 9-330(b) and (c), together with section 9-322(c), should be read as including an interest in the stripped

¹³⁹ See *id.* § 1-201(b)(29) (“‘Purchase’ means taking by sale, . . . mortgage, . . . lien, security interest, . . . or any other voluntary transaction creating a security interest in property.”). By definition, a subsequent purchaser would also include a lender taking an interest in chattel paper to secure a loan. *Id.*

¹⁴⁰ See *id.* § 9-330; *c.f. id.* § 9-322 (providing the standard rule among conflicting priorities that the first party to file or perfect its interest prevails).

¹⁴¹ See *id.* §§ 9-322(a), 9-330(b).

¹⁴² See *id.* § 9-322(c).

¹⁴³ *Id.* § 9-330(b) (emphasis added).

¹⁴⁴ The B.A.P. in *Commercial Money Center* was well aware of the conflict when it noted, “We have just held that the payment streams stripped from the leases are not chattel paper, so arguably this special priority rule is inapplicable.” *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 480 (B.A.P. 9th Cir. 2006). The B.A.P. then stated that as the issue was not before it, it “explicitly decline[d] to resolve this ambiguity in Revised UCC Section 9-330(b).” *Id.*

payment intangible.¹⁴⁵ Mr. Weise argues that a secured party who takes possession of chattel paper has superpriority in the cash proceeds of the chattel paper under sections 9-330(c)(1) and 9-322(c)(2).¹⁴⁶ However, a purchaser must have priority under section 9-330(a) or (b) in order for 9-322 to apply.¹⁴⁷ As the B.A.P. in *Commercial Money Center* noted however, with stripped payment streams the conflicting security interest lies with payment intangibles, not chattel paper.¹⁴⁸

Alternatively, when revenue streams generated by the stripped payment streams are the “proceeds” of chattel paper,¹⁴⁹ and when there is possession-based priority in that chattel paper under section 9-330, section 9-322 may be invoked.¹⁵⁰ Yet, a priority in proceeds does not require a conflict in priority between two (or more) interests in chattel paper.¹⁵¹ More simply put, if I have the only secured interest, I win as against all other secured interests (of which there are none). Comment 8 to section 9-322, “Proceeds of Non-Filing Collateral: Non-Temporal Priority,” gives weight to this outcome by stating that the priority rules of section 9-322 apply even if there is no conflicting security interest in the original non-filing collateral.¹⁵²

However, this resolution is by no means a guaranteed interpretation of Article 9. Under subsection (c), only security interests in chattel paper “which qualify for priority under . . . 9-330” are within the scope of section 9-322.¹⁵³ Because section 9-

¹⁴⁵ Posting of Steve Weise, Steven.Weise@hellerehrman.com, to <http://lists.washlaw.edu/mailman/listinfo/ucclaw-1/> (Aug. 31, 2006) (on file with the author).

¹⁴⁶ In order for section 9-322 to apply, the payments under the stripped payment streams would need to be considered cash proceeds, which they normally would be. See § 9-102(a)(9) (defining “cash proceeds”).

¹⁴⁷ See *id.* § 9-322(c) (providing that “a security interest in collateral which qualifies for priority over a conflicting security interest under Section . . . 9-330 . . . also has priority over a conflicting security interest”).

¹⁴⁸ See 350 B.R. at 480.

¹⁴⁹ See § 9-322(c)

¹⁵⁰ *Id.*

¹⁵¹ Posting of Steve Weise, *supra* note 145.

¹⁵² See § 9-322 cmt. 8 (noting that “priority in the original collateral continues in proceeds if the security interest in the proceeds is perfected and the proceeds [themselves] are cash proceeds”).

¹⁵³ See *id.* § 9-322(c) (“Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under

330 omits any mention of payment intangibles, it remains unclear whether a security interest in collateral (in our case, the security interest in the underlying loan/chattel paper) qualifies over a conflicting security interest (the payment intangible). The word "qualifies" arguably suggests priority disputes involving payment intangibles are indeed within the scope of section 9-322.¹⁵⁴ Since, hypothetically, any potential priority qualifies for priority in the original collateral (were there such a challenge), the existence (or lack thereof) of a priority dispute in the original collateral is therefore arguably immaterial to the section 9-322 analysis.¹⁵⁵

Whether a court would even engage in this section 9-322 analysis is a thornier problem. With respect to chattel paper, section 9-322 is only triggered when there is a conflict under section 9-330. Yet section 9-330 is limited to conflicts between security interests in the chattel paper itself. Does the sale of payment streams and the accompanying automatic perfection produce a security interest in collateral (the underlying leases) that "qualifies for priority" over a conflicting security interest under section 9-330 (a conflicting interest in the chattel paper)? Without using hypothetical priorities, the answer must clearly be "no" because the conflicts arise from a conflict in the same proceeds of two separate pieces of collateral (the payment streams as payment intangibles, and the leases as chattel paper). Thus, section 9-330, by its terms, would not seem to apply. However the issue is resolved, the larger problem for the secured transaction marketplace is that neither reading is particularly strained nor illogical.

If the use of the hypothetical conflict is allowed, then section 9-330(a) or (b) would permit the application of section 9-330(c) and section 9-322(c) in dealing with the cash proceeds of the chattel paper and the payment intangibles. In such case, the Code would seem to provide the more commercially predictable

Section 9-327, 9-328, 9-329, 9-330, or 9-331 also has priority over a conflicting security interest in . . . any supporting collateral; and . . . the proceeds of the collateral . . .").

¹⁵⁴ Posting of Steve Weise, *supra* note 145 (noting that the word "qualifies," together with comment 8 to section 9-322, provides wide latitude in the scope of the applicability of section 9-330).

¹⁵⁵ *Id.* See also §§ 9-322(c), 9-330(b), 9-322 cmt. 8.

outcome by allowing the possessor of chattel paper to prevail over a party whose interest was perfected automatically at some earlier point in time. This argument has the additional benefit of immediate adoptability with no revisions to the Code necessary.

2. Going Once, Going Twice

A literal reading of section 9-318¹⁵⁶ could preclude analysis under section 9-322 and section 9-330 because section 9-318 prohibits reselling interests except in certain limited circumstances.¹⁵⁷ Therefore, a subsequent purchaser would be well advised to consider the potential effect of section 9-318 before relying on section 9-322 for a priority ruling. Logically, once a seller has sold stripped payment streams, he should no longer have an interest in the payment streams to sell to a third party.¹⁵⁸ Yet section 9-318(b), which allows a seller to sell chattel paper a second (or greater) time if the first buyer has not perfected his security interest, arguably may change this result.¹⁵⁹

Initially, a literal reading of comment 4 to section 9-318 reinforces buyers' fears that subsequent purchasers of payment intangibles who obtain priority under another section of Article 9 may usurp their rights.¹⁶⁰ Yet the priority exception established in the comment is qualified by the words "of a promissory note," implying the exception may not actually apply to payment

¹⁵⁶ See § 9-318. The official title is "No Interest Retained in Right to Payment That Is Sold; Rights and Title of Seller of Account or Chattel Paper With Respect to Creditors and Purchasers."

¹⁵⁷ An example of such a limited circumstance would include a seller transferring its interest in chattel paper to a buyer who does not perfect its interest, and then the seller subsequently transfers the interest again to a second buyer who perfects. Under this situation, the second buyer's interest, though later in time, is superior to the original buyer's interest. See *id.* § 9-318 cmt. 3.

¹⁵⁸ See *id.* § 9-318(a) ("A debtor that has sold a[] . . . payment intangible . . . does not retain a legal or equitable interest in the collateral sold.").

¹⁵⁹ See *id.* § 9-318(b) & cmt. 3 (noting that "[i]f the buyer's security interest [in the chattel paper] is unperfected, then for purposes of determining the rights of certain third parties, the seller (debtor) is deemed to have all rights and title that the seller sold"); see also *id.* at cmt. 4 (noting that the rule is not without exception, but is "generally" applicable).

¹⁶⁰ See *id.* § 9-318 cmt. 4 (stating that transferees from and creditors of a seller of payment intangibles could not generally acquire an interest in the sold payment intangibles).

intangibles.¹⁶¹ Both payment intangibles and promissory notes are enumerated in the commentary because interests in both are automatically perfected upon sale,¹⁶² but the two are otherwise dissimilar. Additionally, while comment 3 to section 9-318 provides that a purchaser who takes possession of a promissory note can achieve superpriority under section 9-330 even if the interest in the note had been previously sold to a third party, it makes no mention of payment intangibles.¹⁶³ Consequently, courts should not apply the priority exception of section 9-318 comment 4 to payment intangibles. Section 9-330(d) already treats the two instruments differently. Furthermore, the intangible nature of payment intangibles frustrates the transfer of physical possession following a sale, preventing the purchaser from securing his interest as required to avoid the priority exception under section 9-318 comment 4.¹⁶⁴

Nevertheless, the proper mechanism for resolving priority disputes has long been found in the statutory text of Article 9, notwithstanding the plain language of section 9-318 and its comment.¹⁶⁵ Section 9-318 was inserted into Article 9 with the explicit purpose of rejecting the holding in *Octagon Gas Systems v. Rimmer*,¹⁶⁶ where the Tenth Circuit concluded an account assigned pre-petition was properly considered estate property of

¹⁶¹ *Id.* (providing that even in the case of the sale of a payment intangible with its accompanying automatic perfection, "in certain circumstances a purchaser who takes possession of a promissory note will achieve priority, under Sections 9-330 or 9-331, over the security interest of an earlier buyer of the promissory note").

¹⁶² *See* § 9-309.

¹⁶³ *Id.* § 9-318 cmt. 3. *See also id.* § 9-330(d) (providing for a priority if a subsequent party gives value and takes possession of the promissory note).

¹⁶⁴ Alternatively, though perhaps unlikely, a court could conclude that the ability to transfer such greater rights exists pursuant to section 9-203(b)(2). *See id.* § 9-203(b)(2) ("[T]he debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party . . ."); *see also id.* § 9-203 cmt. 6 ("Certain exceptions to the baseline rule [that a transferor may transfer only what rights it has] enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has.") However, U.C.C. section 9-203 is not a standalone provision granting such rights. The comment itself references part 3, subpart 3 of Article 9, which provides the priority rules as its source of authority. *Id.*

¹⁶⁵ *See id.* § 9-312. Even though the U.C.C. has been amended several times, this section has retained its meaning since its creation.

¹⁶⁶ 995 F.2d 948 (10th Cir. 1993). *See Weise, supra* note 131, at 159 (citing PEB Commentary No. 14, § 9-102(1)(b) (June 10, 1994), *reprinted in* 3A U.L.A. 178 (2002)).

the transferring party.¹⁶⁷ The Permanent Editorial Board (PEB) quickly issued PEB Commentary Number Fourteen condemning the Tenth Circuit's decision.¹⁶⁸ If a trier of fact is willing to recognize that the predictability sought for resolving priority disputes is found by applying the principles, rather than the language, of section 9-318, then the provisions of section 9-330 and section 9-322 would remain applicable. Thus section 9-318, read literally, could remain a pathway for a future court to decide in favor of a stripped-payment purchaser in resolving a priority dispute with a subsequent possessor of the chattel paper who gave value. Even applying such an interpretation, ambiguity remains.

B. Incentives to Behave Badly – Nefarious Double-Dippers

Critics of the decision in *Commercial Money Center* argue that the result may encourage sellers/transferrors of leases to attempt to sell the interest in the revenue streams multiple times, shifting the risk of loss to subsequent purchasers.¹⁶⁹ With a sale of payment streams, a subsequent purchaser who gives value and takes possession of the underlying chattel paper with no actual knowledge of rival interests will be left with an inferior claim. In reality, the incentive for sellers to resell collateral is no greater than it was prior to the Code's adoption of payment intangibles. Rather, the likelihood of a second acquirer detecting a previous security interest in the payment stream is reduced. Unfortunately, the subsequent acquiring party cannot reduce its exposure to loss through additional due diligence.¹⁷⁰ Due to automatic perfection, neither a filings search nor possession of the underlying leases would protect the acquiring party against the risk of prior transfer or provide evidence of the same.¹⁷¹

¹⁶⁷ 995 F.2d at 958.

¹⁶⁸ See PEB Commentary No. 14, *supra* note 166, at 182.

¹⁶⁹ See Schwarcz, *supra* note 9, at 277 (noting that a risk exists that a purchaser of chattel paper may be buying such paper without the payment streams if dealing with a dishonest transferor); see also Kaim, *supra* note 76 (arguing that dishonest lessors will have an additional inducement to resell the same asset multiple times).

¹⁷⁰ See Christenfeld & Melzer, *supra* note 7 (noting that traditional due diligence measures cannot entirely protect against prior fraudulent or duplicative transfers).

¹⁷¹ *Id.*

Readers may find unsettling the shift in the reselling calculus that now appears to favor fraudulent or negligent resales. More troublesome, however is the evisceration of predictability previously guaranteed to a possessor of chattel paper. What this means in terms of actual altered behaviors in the finance marketplace is unclear. To a certain extent, buyers should anticipate discounting as financiers monetize the risk of purchasing collateral that could be affected by a prior sale of payment intangibles.¹⁷² Therefore, all lessors are likely to receive lower returns on lease sales due to the existent risk of a prior transfer of the fractionalized payment streams,¹⁷³ regardless of whether any lessors are ever induced to act fraudulently by the reduced likelihood of being caught.¹⁷⁴

C. Shifting Collateral—The Potentially Problematic Issue of Assigning Stripped Payment Streams and the Underlying Lease in a Single Document

In *Commercial Money Center*, the B.A.P held that stripped payment streams are analytically severable from their associated equipment leases.¹⁷⁵ Thus, two supposedly equivalent transactions (for example, the transfer of a lease and the transfer of said lease's payment stream) could be treated differently, even though both assets were transferred in a single document. This type of determination regarding payment stream stripping presents not only characterization issues, but also impairs the predictability of priority determinations, in favor of a formalistic approach.

While the shifting of collateral is a potential problem, this supposed manipulation of the general rules of Article 9 does not seem to have manifested itself in the marketplace. After review-

¹⁷² See Frisch, *supra* note 6, at 9 (noting that ambiguity in priority rules should adversely impact the value of the disputed collateral).

¹⁷³ See *id.* at 30 n.94 (stating that such a discounting effect is likely to occur in any case involving automatic priorities).

¹⁷⁴ No subsequent cases to date have been reported regarding improper attempts to take advantage of automatic perfection for the purpose of defrauding subsequent acquirers.

¹⁷⁵ See *NetBank FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 478-79 (B.A.P. 9th Cir. 2006).

ing the analysis above, it is difficult to believe that a financier would structure an acquisition of an equipment lease portfolio by using stripping solely to take advantage of automatic perfection. Such a strategy, without more, would be reckless to say the least.¹⁷⁶ A prudent financier would always file a financing statement, if only to mitigate the risk that the transaction be classified as a loan rather than a sale, thus negating automatic perfection in a fell swoop.¹⁷⁷ In addition, such a filing is likely to be beneficial, though not necessarily dispositive in protecting the order of priority.¹⁷⁸ As this shifting of collateral has the potential to alter, allegedly without much benefit, the well thought out framework of Article 9, courts may also be more willing to rely on traditional concepts of market efficiency and predictability in deciding future cases.¹⁷⁹

D. Increased Costs—"B[e]aring" the Price of Change

The costs associated with allowing automatic perfection of payment intangibles appears to be fairly high relative to any

¹⁷⁶ Stern, *supra* note 7, at 209.

¹⁷⁷ See Posting of Donald J. Rapson, [derapson@infionline.net](http://lists.washlaw.edu/mailman/listinfo/ucclaw-l/), to <http://lists.washlaw.edu/mailman/listinfo/ucclaw-l/> (Sept. 29, 2006) (on file with author); see also U.C.C. § 9-309(3) (2005).

¹⁷⁸ Although a subsequent party giving value and taking possession of chattel paper has no obligation to do a filing search, such searches are routine in these types of financial transactions. See § 9-330 cmt. 6 (noting that purchasers of chattel paper are "not required as a matter of good faith to make a search in order to determine the existence of prior security interests").

¹⁷⁹ See Frisch, *supra* note 6, at 11 (noting that the tenets behind prohibiting stripping of payment streams from mortgages are essentially the same as they would be with leases and their payment streams, and therefore, the merger doctrine could be used to prevent such stripping altogether) (citing Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 446-51 (1979) (arguing that an instrument is not just proof of the underlying debt, rather it is the debt itself)). "[T]he idea that the piece of paper on which the bill was written or printed should be treated as if it—the piece of paper—was itself the claim or debt which it evidenced. . . . At one stroke [this doctrine] drastically simplified the law of negotiable instruments, to the benefit of both purchasers and the people required to pay the instruments." Gilmore, *supra* at 449; see also Jacob Cohen, Comment, *Animal, Vegetable, or Mineral?: In re Commercial Money Center and the Classification of Payment Streams "Stripped" from Chattel Paper*, 39 U. TOL. L. REV. 861, 884-85 (2008) (noting that a court could analogize the fractionalization of leases to that of real property, and, as with real property, entertain an argument for merger by finding that any time a party can come into possession of both the underlying lease and the stripped payment streams, such interests would be merged).

benefits.¹⁸⁰ These costs are both directly and indirectly related to the issue of priority. For example, forty-seven million dollars was poised to change hands in the *Commercial Money Center* case based solely on a determination of whether the financier had automatically perfected its interest. In losing that argument, the financier's entire claim was trumped by the trustee in bankruptcy proceedings.¹⁸¹

Indirect costs also abound. As mentioned above, financiers will now include a discount rate for every transaction in which there is any chance of a prior interest trumping their own. Thus, every seller of equipment leases will likely receive less value for his lease portfolios than the market would otherwise dictate. This discount rate results from the uncertainty of superpriority statutes in resolving disputes through possession, and hedges against the risk of a trier of fact re-characterizing a sale as merely a loan.¹⁸² Parties to such financing structures should expect several factors to drive up transaction costs as the marketplace tries to alleviate these risks, including increased due diligence,¹⁸³ account spot-checks to determine collateral payment histories, unnecessary filing fees from conservative financiers, "legending"¹⁸⁴ of individual leases to provide notice to subsequent acquirers, and purchasers of payment intangibles demanding possession of the underlying chattel paper. These costs should be unnecessary for parties who automatically perfect their interests. However, given the unpredictability of the judicial treatment of automatic perfection, many of these measures will likely be adopted to assure certainty of outcome. As a result, the benefits of automatic perfection are severely undermined, and the predictability sought in commercial transactions has been diminished.

¹⁸⁰ See Frisch, *supra* note 6, at 10-11.

¹⁸¹ See *NetBank FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 469-72 (B.A.P. 9th Cir. 2006).

¹⁸² See Schwarcz, *supra* note 9, at 276 (noting that the problems regarding priority ambiguity and non-perfection exist independently of one another).

¹⁸³ See Stern, *supra* note 7, at 209 (noting that at the very least, something greater than the standard U.C.C. filings search will need to be employed).

¹⁸⁴ See *supra* note 8 and accompanying text (describing the commercial practice of legending chattel paper).

Despite such costs, common sense suggests the ruling in *Commercial Money Center* also carries a benefit. Indeed, the decision upholding automatic perfection of an interest in payment intangibles has not been uniformly derided.¹⁸⁵ Nevertheless, practitioners and academics have generally struggled to articulate the benefits of fractionalizing payment streams.¹⁸⁶ Several theories have emerged suggesting potential tax benefits (including the ability to depreciate the leased equipment), the ability to avoid filing costs, and retaining the residual value in the underlying equipment;¹⁸⁷ yet none of the benefits proffered require fractionalization.¹⁸⁸ If traditional finance structures are able to provide similar treatment without requiring a restructuring of the priority rules in Article 9, the question must be: What can or should be done to alleviate the risks of uncertainty and the associated costs brought about by the arguably correct interpretation of stripped payment streams as payment intangibles?¹⁸⁹

III. CORRECTING THE PROBLEM—A QUESTION OF INTERPRETATION OR DRAFTING?

A radical departure from the current approach could require an acquirer of payment intangibles to file a financing statement in order to perfect his interest. This type of fix immediately solves the problem of hidden priorities with payment

¹⁸⁵ See Schechter, *supra* note 74, at 70 (noting that decision appears to be the first reported decision of its kind holding that an automatically perfected interest could prevail over a bankruptcy trustee); see also Kaim, *supra* note 76, at 884 (stating that the decision is being heralded as a victory within the securitization industry, and that any additional perfection requirements could “function as an insuperable barrier, chilling the growing lease rental payment stream segment of the securitization market”) (citing BOND MARKET ASSOCIATION, AN INVESTOR’S GUIDE TO ASSET-BACKED SECURITIES 1, 2 (2004)).

¹⁸⁶ See Posting of Donald J. Rapson, *supra* note 177; see also Frisch, *supra* note 6, at 18 (noting that the case for allowing the fractionalization of payments is unconvincing at best and is greatly surpassed by the potential costs).

¹⁸⁷ See Frisch, *supra* note 6, at 18 (citing Letter from James S. Cochran, *supra* note 33, app. 1 at 4-6).

¹⁸⁸ See Letter from James S. Cochran, *supra* note 33, app. 1 at 6.

¹⁸⁹ *Id.* (noting that the favorable benefits sought by parties attempting to fractionalize payment streams from equipment leases have long been available through past practices and present very little inconvenience in light of the greater need for uniformity and predictability).

intangibles by requiring certain levels of notice, but it also imposes on parties dealing in loan participations the very transactional costs the previous revisers tried to avoid. Alternatively, several drafting and interpretation proposals could resolve the issue without imposing such costs. As with any statutory problem, the reporters could simply amend the applicable text to better accomplish the intended goals of Article 9. Subparts A and B below detail and critique several proposed amendments offered by the Uniform Commercial Code Committee of the California State Bar Business Law Section and also propose a different drafting solution. Aside from simply amending the statutory language, reinterpreting the current language in a strict-constructionist manner or applying the common-law doctrine of merger to the treatment of payment intangibles could ensure that a good-faith subsequent purchaser of collateral without knowledge of a prior transfer maintains a senior priority interest over the undisclosed prior interest. These two options are detailed in Subpart C below.

A. You Can Always Make Amends—Dealing with Priorities

The California State Bar Uniform Commercial Code Committee proposed two amendments to solve the problems of stripped payment streams. Both are straightforward, but neither may be practical in the short-term.¹⁹⁰ The first proposal deals with the secret priority problem by denying automatic perfection to payment intangibles derived from chattel paper.¹⁹¹ Additionally, the proposal seeks to amend section 9-318(b), which suggests a subsequent possessor cannot acquire a greater interest in the chattel paper through possession because the purchaser of the payment streams automatically perfected its interest.¹⁹² The amendment would clarify that subsequent purchasers who take possession of the chattel paper would have rights superior to a prior purchaser who did not perfect by ei-

¹⁹⁰ *Id.* at 7-8 (noting amendments to U.C.C. sections 9-309, 9-318, 9-322, and 9-330 that may solve the priority problems caused by the automatic perfection of payment intangibles); *see also infra* notes 203-208 and accompanying text.

¹⁹¹ *See* Letter from James S. Cochran, *supra* note 33, at 7-8.

¹⁹² *Id.*

ther possession or filing, thereby excluding those who perfect automatically.¹⁹³ The second proposal would ensure that the superpriority rules of section 9-330(b) explicitly apply to conflicting interests between chattel paper and payment intangibles, and that subsequent possessors of chattel paper will have priority in both the chattel paper and its proceeds under section 9-330(c).¹⁹⁴ Unlike modifying definitions, these amendments do not require restructuring the Code. As the revisers found, defining “loan participation” and “financial institutions” to provide automatic perfection solely to loan participations proved overly problematic.¹⁹⁵ As such, the category of payment intangibles is larger by design than was perhaps initially sought.¹⁹⁶

If revised Article 9 is to be amended, then a definitional solution, though potentially more complex than an ad hoc resolution because of the cascading effects of the interrelationships in Article 9, may provide the optimal outcome. As mentioned above, various commentators have argued for the inseparability of payment streams from chattel paper in somewhat analogous situations.¹⁹⁷ One definitional approach to implement this type of inseparability would be to amend the definition of chattel paper to include payment streams derived from chattel paper. The current definition of chattel paper, as argued above, likely does not encompass stripped payment streams because there is no record evidencing the monetary obligation—there is only the

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1372 (1999) (noting the original proposal was to except from the filing requirement the sale of payment intangibles between “financial institutions”).

¹⁹⁶ See Cohen, *supra* note 179, at 880 & n.163 (quoting Declaration of Charles W. Mooney, Jr. ¶ 10, *Kipperman v. Netbank (In re Commercial Money Ctr., Inc.)*, 56 U.C.C. Rep. Serv. 2d 54 (Bankr. S.D. Cal. 2005) (“[I]t was and remains my understanding, and I believe that of the Drafting Committee, that the residual category of payment intangibles is not limited to rights to payment arising out of loan participations.”)).

¹⁹⁷ Some commentators argue for inseparability by utilizing a doctrine of merger that analogizes the interests in chattel paper to real property and easements, or the inseparability of rights and obligations under a negotiable instrument. See Gilmore, *supra* note 179, at 449; see also Cohen, *supra* note 179, at 884-85; Frisch, *supra* note 6, at 19 (citing RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 5.4 (1997) (noting that a mortgage separated from the obligation cannot be enforced) and *Carpenter v. Longan*, 83 U.S. 271, 276 (1872) (holding that the “debt is the principle thing and the mortgage is an accessory” in arguing that the two are inseparable)).

monetary obligation.¹⁹⁸ For instance, the drafters could append section 9-102(b)(11) with a clause providing that “chattel paper” specifically includes any monetary obligations deriving directly from chattel paper.¹⁹⁹ On the other hand, simply redefining “payment intangibles” or the catchall “general intangibles” to exclude fractionalized payments would be insufficient and may likely exacerbate problems by requiring courts to apply a label to the payment streams that is not borne out by the statutory language.²⁰⁰

B. You Can Always Make Amends Redux—Shifting Collateral Through Drafting

Hypothetically, current judicial interpretation of the definition of payment intangibles allows for the possibility of shifting collateral types by using certain contractual language.²⁰¹ In *Commercial Money Center*, the court held that language that acts to strip the payment streams from the underlying paper, even if done in the same document that transfers all other underlying rights, is sufficient to create the separate collateral.²⁰² This holding makes payment streams analytically severable from the equipment leases once the payment streams are

¹⁹⁸ Cohen, *supra* note 179, at 871.

¹⁹⁹ See U.C.C. § 9-102(a)(11) (2005). The first sentence of section 9-102(a)(11) provides “Chattel paper” means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods.” The proposed alternative would add the following clause after “goods”: “including specifically, any monetary obligations deriving directly or otherwise assigned separately from chattel paper.” U.C.C. section 9-102(a)(11) cmt. 5(b) and (d) would likewise be revised to note that the amendment was intended specifically to deal with fractionalized payment streams under chattel paper and was intended specifically to alter the holding in *Commercial Money Center* that such stripped payment streams be classified as payment intangibles.

²⁰⁰ See Cohen, *supra* note 179, at 877 (noting that the stripped payment streams could arguably be classified as “accounts,” but that such a reading may not be “a natural reading of the Code”).

²⁰¹ See *supra* notes 172-77 and accompanying text. The shifting of collateral is an attempt to reclassify chattel paper collateral as payment intangible collateral in order to avail oneself of the automatic perfection granted to purchasers of payment intangibles.

²⁰² NetBank FSB v. Kipperman (*In re Commercial Money Ctr., Inc.*), 350 B.R. 465, 478 (B.A.P. 9th Cir. 2006).

stripped, likewise altering their respective treatment under Article 9.

A second proposal for amendments to Article 9 put forth by California's Uniform Commercial Code Committee provides four specific amendments to prevent possible shifting of collateral. Three of the four propositions put forth to correct this problem are definitional or technical, and touch on the same or similar code sections as the prior proposals.²⁰³ The fourth seeks to add a new provision to Article 9, providing that any separate assignment of payment rights from chattel paper or an instrument, however accomplished, will be construed as an assignment of the chattel paper or instrument respectively.²⁰⁴ This second proposal would likely resolve the hierarchical ambiguity in the Article 9 priority rules resulting from the *Commercial Money Center* decision. However, treating an assignment of payment rights as an assignment of the chattel paper itself, essentially preventing separation of the interests,²⁰⁵ may not be the only solution.

Another possible resolution may be to treat the assignment of payment rights in chattel paper or an instrument as an assignment of proceeds instead of an assignment of the respective chattel paper or instrument.²⁰⁶ Such treatment would deal with the "shifting collateral" problem by preemptively classifying such a transfer as "a transfer of proceeds of the collateral" and not as "separate collateral." This approach would further resolve

²⁰³ See Letter from James S. Cochran, *supra* note 33, at 7-8 (proposing to amend section 9-102(a)(11) so that the definition of "chattel paper" includes the monetary obligations that are represented by the related records; section 9-102(a)(47) so that the definition of "instrument" includes the right to the payment of any monetary obligation represented by the related instrument; and sections 9-318(b) or 9-322(c) to provide that a subsequent purchaser of chattel paper or an instrument who takes possession and otherwise meets the requirements in section 9-330 will have a "superpriority" in the payments represented by the underlying chattel paper or instrument).

²⁰⁴ *Id.* The proposal provides that the stripping of such payment streams, whether done in the agreement where other rights are also separately assigned or otherwise, would not create a separate type of collateral (i.e. payment intangible, general intangible, account, etc.). The proposal suggests including such language in a new subsection to section 9-203. *Id.*

²⁰⁵ See *infra* notes 209-216 and accompanying text (discussing the potential applicability of the merger doctrine to payment intangibles and their underlying chattel paper).

²⁰⁶ U.C.C. section 9-203 may also be a suitable home for such an amendment, since subsection (f) deals with proceeds, and subsection (g) deals with the codification of the common-law doctrine of collateral following the right to payment. See *supra* note 204 and accompanying text.

the priority problem identified in Part III(A) by making use of the Article 9 rules for priority disputes involving the proceeds of collateral.²⁰⁷

Theoretically, either redrafting alternative should provide a resolution to the potential collateral shifting problem, but the latter provides a cleaner analytical approach to the problem. Yet it is unclear whether any concerns regarding shifting collateral have been realized, nor is it clear to what extent, if any, a party would benefit from attempting to shift collateral in this manner. However, resolving the priority concern would probably alleviate, if not eliminate altogether, any potential shifting collateral concern or any price discounting done because of such potential problem. Presumably parties structure their transactions as sales of payment intangibles to avail themselves of the automatic perfection defense. Once that benefit is removed, the primary incentive to structure a transaction in this manner is eviscerated, and as such the collateral shifting problem disappears.²⁰⁸

C. Immediate Answers: Common Law Merger and/or Renewed Analysis

1. Indivisibility—The Prohibition of Stripping

Classifying payment intangibles as chattel paper has the allure of providing a well-devised priority system that provides predictable outcomes; however, that change alone does not address whether payment streams should be assignable separate from the underlying leases. Under the theory that payment rights and the underlying chattel paper are inseparable, the common law merger doctrine could be employed to prohibit such severances.²⁰⁹ Even though the merger doctrine is not provided

²⁰⁷ See U.C.C. § 9-322(c) (2005) (providing that a subsequent purchaser of chattel paper that takes possession and qualifies for priority under section 9-330 would also take priority over a conflicting security interest in the proceeds of that chattel paper).

²⁰⁸ "Take away the motive and you take away the sin." See *supra* note 1 and accompanying text.

²⁰⁹ See Gilmore, *supra* note 179, at 449 n.15 (outlining the history of the merger doctrine and noting its automatic application to many types of negotiable commercial paper).

for specifically in Article 9, such common law doctrines are often used to supplement the Code.²¹⁰

Under the theory of common law merger, separate and distinguishable rights or obligations become legally inseparable. The doctrine holds that if any such item is separated, by operation of law, it shall be remerged with its constituent parts.²¹¹ Variations of the doctrine have been utilized in many legal fields, including torts,²¹² real property law,²¹³ criminal law,²¹⁴ civil procedure,²¹⁵ and intellectual property law.²¹⁶ Given the historical use of the merger doctrine in the legal field, and the theory of inseparability behind it, there is no reason it could not be utilized in the present case.

Prohibiting the separation of payment streams from chattel paper, *for the purposes of priority under Article 9*, will arguably affect neither the parties' freedom of contract,²¹⁷ nor their ultimate decision to engage in such a transaction.²¹⁸ Moreover, this

²¹⁰ See § 1-103 cmt. 2 (providing that common law may be used to supplement the provisions of the U.C.C.).

²¹¹ See, e.g. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 548-49 (5th ed. 2007) (describing the merger concept as utilized in real estate as "[t]he theory . . . that when a mortgagee's interest and a fee title coincide and meet in the same person, the lesser estate, the mortgage, merges into the greater, the fee, and is extinguished."); cf. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.5 (1997) (criticizing the merger doctrine as unnecessarily confusing).

²¹² See RESTATEMENT (SECOND) OF TORTS § 242 cmts. a-f (1965) (discussing the merger of intangible rights into certain converted documents).

²¹³ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.5 (2000) (noting that servitudes are terminated by operation of law when the "benefits and burdens" of the servitude and easement are merged in "a single owner").

²¹⁴ 22 C.J.S. *Criminal Law* § 18 (2006) (discussing certain limitations in criminal prosecutions of lesser included offenses and felony murders due to the merging of the elements of the crimes).

²¹⁵ 49 C.J.S. *Judgments* § 704 (2009) (noting that the merger principle is a subset of the principle of res judicata which prohibits a plaintiff from bringing a subsequent claim of any offense included within the prior claim).

²¹⁶ See Harris Weems Henderson, *Through the Looking Glass: Copyright Protection in the Virtual Reality of Second Life*, 16 J. INTELL. PROP. L. 165, 178 (2008) (describing the merger doctrine in the field of copyright law as one which prohibits legal protection expressions that "are so closely" interrelated to the underlying ideas as to be inseparable).

²¹⁷ U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . [l]aw impairing the Obligation of Contracts.").

²¹⁸ 16A C.J.S. *Constitutional Law* § 721 (2005) (noting that freedom of contract is a qualified right subject to reasonable regulations to protect a significant and legitimate public purpose). Furthermore, parties aware of the use of the merger doctrine may make

solution does not require amending Article 9 to distinguish payment intangibles or define chattel paper as including derivative payment streams.²¹⁹ The obvious drawback to the utility of implementing the merger doctrine in the context of stripped payment streams is the lack of precedent in this context.²²⁰ The only way to overcome this obstacle with any certainty and without resort to the legislative process would be through subsequent litigation, which may not be forthcoming in the near future given the recentness of the *Commercial Money Center* decision and investors' current preference for safer investment vehicles.²²¹

If payment streams are suddenly declared inseparable from chattel paper, one might wonder whether an assignment of proceeds would likewise be affected. In both cases, the end result should be very similar, with the transferee ultimately receiving the payments due. However, the assignment of proceeds and the fractionalization of payment streams themselves are formalistically very different. The difference, and the key reason that classifying fractionalized payment streams as payment intangibles caused priority concerns, is that third parties concerned with priority rights in assigned payment streams may have their rights unknowingly affected. Nevertheless, the mechanisms for perfecting priority interests for assignments of proceeds and determining which corresponding interest would triumph are already contemplated within the special rules created

any necessary pricing adjustments regarding any reallocation of risk prior to closing on their transaction.

²¹⁹ Of course, the revisers could specifically amend Article 9 to codify the result. The essential difference would, therefore, be in how the result comes about, either via judicial or legislative processes.

²²⁰ Compare David Frisch & Henry D. Gabriel, *Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 747, 747-49, 757 (1995) (discussing the concept of merger in the context of negotiable instruments under Article 3), with Frisch, *supra* note 6, at 10 (analyzing the application of the merger doctrine in regards to promissory notes and mortgages).

²²¹ See Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1514-16 (2008) (noting investors' increased preference for asset-backed securities as well as for deals that utilize SPVs in order to reduce risk of failure, more accurately price the value of the securities, and avoid any problems that may arise if the originator of the securities were to enter bankruptcy).

for them under the framework of Article 9.²²² Therefore, given the fundamental difference in statutory treatment, assignments of proceeds should not be prohibited under the merger doctrine if it is adopted with regards to severed payment streams.

While the merger doctrine has not previously been employed in the context of payment intangibles under Article 9, its widespread use in multiple legal fields, its adaptability to this particular situation, and the ease with which it may be implemented justifies an in-depth examination by the next court confronted with this issue. The merger doctrine presents a more cost-efficient solution by eliminating the increased due diligence costs borne by acquirers of payment streams. It further mitigates the priority risks created by the potential for hidden interests and the requirement that all purchasers of payment streams file financing statements. While the application of the merger doctrine presents a sound, albeit untested mechanism for restoring certainty to priority disputes concerning payment intangibles, a closer reading of the comments to Article 9 may provide a similar outcome through a more conservative approach, with either option ensuring a subsequent good-faith purchaser of chattel paper prevails over the possessor of a hidden interest.

2. A Closer Look at the Comments May Get You Where You Need to Go

The final proposal for resolving the judicial conundrum regarding stripped payment intangibles is a hyper-textual analysis of section 9-322, comment 8.²²³ Although on its face, section 9-330 seems inapplicable to a priority conflict between an interest in chattel paper and a payment intangible,²²⁴ a closer read-

²²² See U.C.C. § 9-203(f) (2005) (noting that “a security interest in collateral [grants] the secured party the rights to [the] proceeds” in the collateral under section 9-315); *id.* § 9-315 (detailing a “secured party’s rights on [the] disposition of collateral and in proceeds”); *id.* § 9-322(c) (providing for the resolution of priority disputes and for the disposition of the proceeds of the collateral).

²²³ See *supra* Part II.A.1.

²²⁴ See § 9-330(a)-(b) (noting that a subsequent purchaser of chattel paper who meets all the other statutory requirements “has priority over a [conflicting] security interest *in the chattel paper*”) (emphasis added).

ing of the comments belies that interpretation.²²⁵ Such a close reading depends on a court's willingness to look past the face of the statute and interpret the statutory language and comments more in line with the purposes of Article 9.

As argued above, the hook for applying section 9-330(a) or (b) comes from comment 8 to section 9-322, which provides that "[section 9-322] determines priority in proceeds of non-filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral."²²⁶ This argument is predicated on the legal hypothetical that a subsequent possessor of chattel paper who has given new value, in good faith, in the ordinary course of business without knowledge that its purchase violates the rights of another secured party, triumphs in its priority rights as against all others, even though no other challenger exists.²²⁷

The B.A.P. in *Commercial Money Center* thought this interpretation to be unlikely, but refused to comment further.²²⁸ However, if such an interpretation were in fact adopted, sections 9-322 and 9-330 would give priority to the subsequent possessor in both the chattel paper and its proceeds, as they would be cash proceeds. Nevertheless, this approach is not without obstacles. For one, section 9-330 refers only to conflicting interests "in the chattel paper," suggesting its inapplicability to stripped payment streams. Additionally, although relatively unlikely, equipment leases may no longer qualify as chattel paper once their associated payment streams are stripped, and thus sections 9-322 and 9-330 might be inapplicable.²²⁹ This result occurs because a lease with stripped payment streams does not fall within the strictly construed definition of chattel paper under Article 9, as there is no longer a record that evidences

²²⁵ Compare Posting of Steve Weise, *supra* note 145, with *NetBank FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 469-72 (B.A.P. 9th Cir. 2006) (noting that section 9-330 would be inapplicable to such an analysis as the court held the collateral was a payment intangible, not chattel paper).

²²⁶ See § 9-322 cmt. 8.

²²⁷ *Id.*

²²⁸ See *id.* § 9-322(c) (providing that section 9-322(c) is applicable to "a security interest in collateral which *qualifies* for priority over a conflicting security interest under Section . . . 9-330") (emphasis added).

²²⁹ See *id.* § 9-330(c).

both a “lease of specific goods” *and* a “monetary obligation.”²³⁰ Therefore, a subsequent purchaser of “shell” leases arguably acquires chattel paper that has devolved into some other form of collateral.²³¹ While facially interesting, this argument is not likely to prevail on the merits.

Assigning a payment stream under an equipment lease should not reduce the lease to a form of collateral other than chattel paper. Although the right to receive payment streams is legally deemed severed from the underlying lease, fundamentally the monetary obligation still exists. The monetary obligations manifested in stripped payment streams have merely been redirected to a third party. As such, the assignment of the right to receive payment streams should not affect the status of the underlying instrument as chattel paper.

CONCLUSION

Under the murky cloud of doubt is a ray of hope in the fractionalized payment stream industry that would not foreclose its marketplace altogether, even if the benefits are minimal. Though this type of collateral is probably best characterized as a “payment intangible,” under the current definitions, two remedies are immediately available to prevent priority problems arising out of “secret” perfected interests. Courts may decide to adopt the common-law doctrine of merger as a convenient solution that is neither mandated nor prohibited by Article 9, or they may proceed with the analysis suggested in section 9-322, comment 8. The latter approach presupposes that qualms about the modifier “which qualifies” in the introductory language of the statutory text, or the issue of whether lease chattel paper retains such a classification once its payment streams have been stripped, are adequately resolved.²³² In any case, a court will likely favor one of these approaches in light of the dangers to

²³⁰ See *id.* § 9-102(a)(11) (defining “chattel paper”).

²³¹ See Cohen, *supra* note 179, at 883 (arguing that what a purchaser has acquired is either “goods” or “general intangibles,” and therefore the section 9-322 comment 8 analysis should not apply as there is not even one conflicting interest in chattel paper) (citation omitted).

²³² See *id.* § 9-322(c).

predictability in the secured transactions marketplace that a contrary ruling would engender.

The other alternatives briefly discussed, whether they be a re-argument for the classification of fractionalized payment streams as "chattel paper" or the argument for classification as "accounts," are predicated on a tortured reading of Article 9. If adopted, these approaches could cause greater confusion among competing priority claimants based on less-than-rigorous judicial analysis, especially if jurisdictional splits evolve. A better result, at least until the Code is again revised, is to resolve priority conflicts under the merger doctrine or a hyper-textual reading of section 9-322. Either approach could be easily adopted with little cost to the participants in the stripped-payment-stream marketplace. More importantly, the adoption of either potential solution should work to prevent the next "innocent" purchaser from being legally forced to bare all.

RECENT DECISION

CIVIL RIGHTS—EMPLOYMENT—BEFORE AN EMPLOYER MAY LAWFULLY TAKE RACE-BASED ACTION TO REMEDY A PRACTICE THAT HAS A DISPARATE IMPACT, THE EMPLOYER MUST HAVE A STRONG BASIS IN EVIDENCE TO BELIEVE THAT IT WILL BE SUBJECT TO DISPARATE-IMPACT LIABILITY IF IT FAILS TO TAKE THAT ACTION

I. FACTS

In 2003, New Haven, Connecticut firefighters took a promotional exam to qualify for promotion to the rank of lieutenant or captain.¹ The interested candidates invested both personal time and money to prepare for the exam over a three-month period.² The results of the exam revealed that white candidates had outperformed minority candidates.³ Fearing disparate-impact li-

¹ Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009). New Haven (City) hired Industrial/Organizational Solutions, Inc. (IOS) to develop the exam. *Id.* at 2665. IOS developed the written and oral portions of the exam by performing job analyses of the lieutenant and captain positions, which included interviews and ride-alongs with incumbent officers. *Id.* IOS oversampled minority firefighters during the job analyses in order to prevent unintentionally favoring white firefighters on the examination. *Id.* IOS chose assessors for the oral portion of the exam from outside of Connecticut. *Id.* at 2666. The assessors were sixty-six percent minority and included a three-member panel—one white, one black, and one Hispanic. *Id.* at 2666, 2668.

² *Id.* at 2666, 2681. IOS compiled the source material, approved by the City's fire chief, and the City provided a list of the sources used for the exam, as well as the specific chapters from which the questions were derived, to the candidates. *Id.* at 2665-66. Proponents of the exam later testified that the source material represented "nationally recognized," "accepted standards" for firefighting, while opponents stated that the materials were not relevant to firefighting practices in New Haven. *Id.* at 2667. The materials cost approximately \$500. *Id.*

³ *Id.* at 2664. Twenty-five of forty-three white candidates passed the lieutenant examination, while only six of nineteen blacks and three of fifteen Hispanics passed. *Id.*

ability, the New Haven Civil Service Board (CSB) conducted a series of meetings to determine whether to certify the exam.⁴

The City's counsel, Thomas Ude, first raised the issue of disparate impact, stating that the statistical disparity in the results was enough to justify the City's use of "race-conscious remedies."⁵ Conversely, Chad Legel, the Vice President of IOS, the company the City had hired to design the promotional examination, argued that both the written and oral examinations were based on critical skills as determined by the job analyses performed by his company.⁶ Another witness, Janet Helms, an expert on the impact of race as it relates to test performance, questioned the validity of the job analyses performed by IOS.⁷ Helms noted that sixty-seven percent of the job analysis questionnaires were completed by white firefighters.⁸ Because "different groups perform the job differently," Helms reasoned that the exam questions might have unduly favored the white candidates.⁹ However, Helms testified that the results of the examination were not atypical and that a disparity would have existed regardless of the test administered.¹⁰

An IOS competitor, Christopher Hornick, testified to the Board that although the disparity of the exam scores was somewhat higher than what he had seen in other areas of the country, the impact was "generally in the range that [he had] seen professionally."¹¹ He further offered that the use of assessment centers might have been a valid alternative to the written and oral examinations.¹² Specifically, Hornick stated

at 2666. Sixteen of twenty-five whites passed the captain examination, while only three of eight blacks and three of eight Hispanics passed. *Id.*

⁴ *Id.* at 2666-71. According to the city charter, the New Haven Civil Service Board (CSB) certifies a ranked list of applicants who pass the exam. *Id.* at 2665. The city charter then applies a "rule of three," which requires the vacant captain or lieutenant position to be filled from the top three scorers on each respective certified list. *Id.*

⁵ *Id.* at 2666-67.

⁶ *Id.* at 2668.

⁷ *Id.* at 2669.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 2669. In subsequent meetings, Ude continued to advocate the use of equally valid, alternative testing methods such as the assessment centers proposed by Hornick. *Id.* at 2670. Yet, firefighter Frank Ricci pointed out during his testimony that assess-

that assessment centers better identified the best candidates while “demonstrat[ing] dramatically less adverse impacts.”¹³ Results from the nearby city of Bridgeport also demonstrated the viability of alternatives.¹⁴ Bridgeport found that changing the weight of examinations to favor the oral portion of the exam more closely resembled the reality of the job and resulted in a better representation of minority candidates.¹⁵

With both the advocates and opponents of the examination threatening discrimination lawsuits, the City discarded the results.¹⁶ Subsequently, the firefighters who passed the examinations filed suit against the City for discrimination in violation of Title VII of the Civil Rights Act of 1964.¹⁷ The firefighters filed suit in the United States District Court for the District of Connecticut seeking summary judgment.¹⁸ The district court granted summary judgment in favor of the City, and on appeal, the Court of Appeals for the Second Circuit affirmed.¹⁹ The United States Supreme Court granted certiorari and held: reversed.²⁰ Before an employer may lawfully take race-based action to remedy a practice that has a disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate-impact liability if it fails to take that action.²¹ An employer has a strong basis in evidence to believe that it will be subject to disparate-impact liability when the practice is not job related and consistent with business neces-

ment centers were not available to the Fire Department at the time of the promotional exams and would take several years to develop. *Id.*

¹³ *Id.* at 2694 (Ginsburg, J., dissenting).

¹⁴ *See id.* at 2693.

¹⁵ *Id.* at 2693.

¹⁶ *Id.* at 2664 (majority opinion).

¹⁷ *Id.* The plaintiffs included seventeen white firefighters and one Hispanic firefighter. *Id.* at 2671. The firefighters claimed that by failing to certify the exams, the City had engaged in race-based discrimination in violation of the disparate-treatment provision of the Act. *Id.* at 2664, 2671. The firefighters also brought a constitutional claim under the Equal Protection Clause of the Fourteenth Amendment; however, citing *Atkins v. Parker*, 472 U.S. 115, 123 (1985), the Court decided not to address the constitutional claim because the case was disposed of within the statutory claim. *Ricci*, 129 S. Ct. at 2664-65, 2672.

¹⁸ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 144-45 (D. Conn. 2006).

¹⁹ *Ricci*, 129 S. Ct. at 2671-72.

²⁰ *Id.* at 2672.

²¹ *Id.* at 2677.

sity, or when an equally valid, less discriminatory alternative to the practice exists and the employer fails to adopt the alternative.²²

II. RELATED LAW

Ricci meets at the intersection of the statutory doctrines of disparate treatment and disparate impact, while importing a constitutional standard into its analysis.²³ Accordingly, an understanding of *Ricci* demands an examination of both Title VII doctrines and an investigation into the origin of the strong-basis-in-evidence standard.²⁴

A. Disparate Treatment

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, *because of such individual's race*, color, religion, sex, or national origin"²⁵ Thus, Title VII defends employees from intentionally discriminatory actions by employers.²⁶ This practice, known as disparate treatment, is the most straightforward form of discrimination prohibited by Title VII and requires proof of an employer's discriminatory intent in taking a particular job-related action.²⁷

McDonnell Douglas Corp. v. Green established the analysis a court must follow and the shifting burdens of proof imposed on the parties in a disparate-treatment claim.²⁸ In *McDonnell Douglas*, a black employee who had participated in protests that disrupted the employer's business brought suit when the company refused to rehire him after a layoff.²⁹ Ordering a remand on the issue of pretext, the Court outlined the disparate-

²² *Id.* at 2678.

²³ *See id.* at 2674-75.

²⁴ *See id.* at 2672-73.

²⁵ 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added).

²⁶ *Ricci*, 129 S. Ct. at 2672.

²⁷ *Id.* (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977) and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988)).

²⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

²⁹ *Id.* at 794-96.

treatment analysis.³⁰ The analysis begins by examining whether the employer made an employment decision based on race.³¹ Once the plaintiff establishes a prima facie case of intentional discrimination because of race, the employer is then given the opportunity to demonstrate that a “legitimate, nondiscriminatory reason” existed for the employment practice.³² As a final step, the employee may rebut by demonstrating that the business justification given by the employer was mere pretext.³³

B. Disparate Impact

Title VII holds employers liable not only for intentionally discriminatory practices, but also for facially neutral practices that produce a racially disparate result.³⁴ The Court’s decision in *Griggs v. Duke Power Co.* makes clear Title VII’s prohibition against practices that have a disparate impact.³⁵ In *Griggs*, the issue was whether particular employee testing and educational requirements for job assignments and transfers were lawful.³⁶ The Court held that where the practice is not job related and has a disparate impact on a minority group, it is prohibited although the practice lacks discriminatory intent.³⁷ The Court looked to the plain language of the Act and reasoned that the intent of Congress was to “achieve equality of employment opportunities,” and that in achieving this objective, not only must the intent of the employer be evaluated, but also the impact of

³⁰ *Id.* at 802-04, 807.

³¹ *See id.* at 802. The plaintiff bears the initial burden of demonstrating that the employment action was taken because of race. *See id.* The Court in *McDonnell Douglas* stated that although methods of establishing a prima facie disparate-treatment claim may differ depending on the facts, the suggested method in the case sub judice required the plaintiff to demonstrate (1) that the plaintiff was a racial minority, (2) that he applied for and was qualified for the job in question, (3) that he was rejected, and (4) that the position remained open and the employer continued to seek applicants having the plaintiff’s qualifications. *Id.*

³² *Id.*

³³ *Id.* at 804.

³⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

³⁵ *Id.*

³⁶ *Id.* at 425-26. Duke Power required a high school education for assignment to any department outside of the company’s Labor Department. *Id.* at 427. After Title VII became effective, Duke Power instituted an additional requirement of passing two general intelligence tests. *Id.* at 427-28. Neither test was job related. *Id.* at 428.

³⁷ *Id.* at 431-32.

the practice.³⁸ In so holding, the Court expanded the interpretation of Title VII to prohibit both disparate treatment and disparate impact.³⁹ Again looking to the intent of Congress, the Court further held that testing in itself is not prohibited, but must be related to "job performance" and consistent with "business necessity."⁴⁰

Albemarle Paper Co. v. Moody built on the concept of job relatedness introduced in *Griggs*.⁴¹ *Albemarle* tackled the issue of what an employer whose testing procedures have a discriminatory effect must demonstrate in order to show that the testing practice is job related, as required in *Griggs*, and thus able to withstand Title VII scrutiny.⁴² The Court held that the testing procedures implemented by *Albemarle* failed under Title VII.⁴³ In making its determination, the Court evaluated the *Griggs* concept of job relatedness in the context of the plant's operation and the history of the testing program.⁴⁴

Not only did the *Albemarle* Court clarify how to evaluate the job relatedness of testing procedures having a disparate impact, the Court also outlined the shifting burdens of the chal-

³⁸ *Id.* at 429, 432.

³⁹ *Ricci*, 129 S. Ct. at 2672-73.

⁴⁰ *Griggs*, 401 U.S. at 431, 436 (emphasis added). This portion of the holding is best encapsulated by the Court's closing words that "any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436. The holding in *Griggs* was later codified in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). *Ricci*, 129 S. Ct. at 2673.

⁴¹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426-27 (1975).

⁴² *Id.* at 408. Outside the scope of the instant discussion, *Albemarle* also addressed the standards a court must follow in determining backpay in employment discrimination suits. *Id.* Similar to the plaintiffs in *Griggs*, the plaintiffs in *Albemarle* challenged the lawfulness of *Albemarle's* testing program, which required candidates for employment to possess a high school diploma and pass both nonverbal intelligence and verbal facility tests. *Id.* at 410-11.

⁴³ *Id.* at 435-36.

⁴⁴ *Id.* at 427. In evaluating job relatedness of the testing procedures, the Court considered the specific operational methods of the plant in relation to the necessity for testing. *Id.* Specifically, the Court examined departmental structure, the interplay between skill and advancement within departments, and whether the technology in use at the facility required a threshold level of intelligence. *Id.* In evaluating the history of the testing program, the Court examined whether the tests were adopted in a "casual fashion," *id.* at 429, bearing little or no relation to the job at hand, or, following EEOC guidelines, were "predictive of or significantly correlated with important elements of work behavior." *Id.* at 431 (quoting 29 C.F.R. § 1607.4(c) (1975)).

lenging party and the employer in a disparate-impact suit.⁴⁵ In so doing, the Court introduced an additional step into the disparate impact analysis: whether, at the time of testing, there existed an *equally valid, less discriminatory, alternative means of testing*.⁴⁶ If, despite the availability of an equally valid alternative, an employer proceeds with the existing method of testing, the employer is subject to a Title VII violation even though the existing testing methods are found to be job related.⁴⁷

C. The Constitutional Standard under Equal Protection Claims

The *Ricci* majority conducts its Title VII analysis through the lens of the strong-basis-in-evidence standard, a constitutional standard derived from the equal protection claims in *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Co.*⁴⁸ In *Wygant*, the Court addressed the issue of whether a policy with the stated purpose of remedying past racial discrimination violated the Equal Protection Clause of the Fourteenth Amendment as it pertains to nonminority educators.⁴⁹ The Court held that when a nonminority racial classification challenges a race-based remedial action program, there must exist a “*strong basis in evidence*” that the action was necessary for it to withstand scrutiny.⁵⁰ The Court reasoned that the strong-basis-in-evidence standard comported with precedent establishing heightened scrutiny for practices involving race-

⁴⁵ *Id.* at 425. The challenger of the practice establishes his or her prima facie case by demonstrating a statistical disparity in the employer's hiring or promotional practice. *Id.* The employer then rebuts by demonstrating that the practice is job related. *Id.* If the challenger can demonstrate that an equally valid, less discriminatory practice was available to the employer at the time of testing, which the employer chose to disregard, then the challenger can prevail under Title VII. *See, e.g., id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *Ricci*, 129 S. Ct. at 2675.

⁴⁹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 269-74 (1986). The Board instituted a layoff provision that retained minority educators with less seniority than non-minority educators with greater seniority in an effort to ease racial tensions in the community. *Id.* at 270-72.

⁵⁰ *Id.* at 277 (emphasis added).

based classifications.⁵¹ Furthermore, race-based remedial practices impose some level of burden on nonminority classifications.⁵² The strong-basis-in-evidence standard ensures that nonminority classifications are not unduly burdened by an overbroad desire to cure general societal discrimination.⁵³

The Court in *City of Richmond v. J.A. Croson Co.* further justified the use of the strong-basis-in-evidence standard in matters involving race-based classifications.⁵⁴ The *Croson* Court examined whether Richmond's practice of requiring city contractors to award thirty percent of their subcontract expenditures to minority-run enterprises violated the Equal Protection Clause of the Fourteenth Amendment.⁵⁵ The Court applied the strong-basis-in-evidence standard to Richmond's policy, opining that strict scrutiny was necessary in all matters of racial classifications because of the danger of stigmatic harm, feelings of racial inferiority, and development of racial hostility.⁵⁶ To apply the heightened standard of review, the Court examined whether there was a compelling government interest in adopting the remedial practice and whether the practice was narrowly tailored to meet that end.⁵⁷ Ultimately, the Court determined that Rich-

⁵¹ See *id.* at 279-80. The Court admonished the lower court for using the less stringent "reasonableness" standard to evaluate the necessity of the race-based remedial action. *Id.* at 279.

⁵² *Id.* at 282. The burden imposed on nonminority classifications by race-based remedial practices is acceptable when it is spread across society generally and narrowly tailored to meet remedial goals, as in the case of implementing hiring goals. *Id.* Conversely, practices such as the layoffs challenged in the instant case impose a substantial burden on a few individuals. *Id.* at 283.

⁵³ See *id.* at 276. General societal discrimination lacks the specificity necessary to justify a race-based remedy. *Id.*

⁵⁴ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 500 (1989). The Court also implied that the strong-basis-in-evidence standard could be applied to constitutional or statutory violations involving race-based classifications. See *id.* at 500.

⁵⁵ *Id.* at 476-77.

⁵⁶ *Id.* at 493-94, 500. The standard is independent of the race of those subject to the race-based classification. *Id.* at 494.

⁵⁷ *Id.* at 505-06. The compelling government interest must be in remedying actual past discrimination in the particular field at issue. See *id.* at 505. This statement is true whether Richmond was an active or merely a passive participant in discrimination in the construction industry. See *id.* at 492. However, remedying general past societal discrimination is not a valid compelling government interest for implementing practices that entail race-based classifications. See *id.* at 505. No evidence of discrimination existed in Richmond's construction industry. *Id.* Rather, testimony revealed that minority contracts were simply difficult to obtain. *Id.* at 480. Furthermore, Richmond's race-

mond's remedial policy failed to meet the heightened standard and consequently violated the Equal Protection Clause.⁵⁸

III. RICCI V. DESTEFANO

A. Majority Opinion

In *Ricci*, the Court first explained Title VII's express prohibition on disparate treatment and the development of the implicit prohibition on disparate impact.⁵⁹ It revealed the origins of the interplay between disparate impact and job relatedness, business necessity, and alternative employer testing practices.⁶⁰

The majority began its analysis with the assumption that the City's dismissal of the promotional examinations constituted a discriminatory action: "[T]he City made its employment decision *because of race*. The City rejected the test results solely because the higher scoring candidates were white."⁶¹ Therefore, the basic issue addressed by the Court was whether the City's discriminatory action was defensible.⁶² The Court's goal was to provide direction for reconciling disparate treatment and disparate impact when these prohibitions collide.⁶³

The Court avoided the extremities proposed by the parties and instead implemented the strong-basis-in-evidence standard.⁶⁴ It reasoned that the strong-basis-in-evidence standard

based remedial practice was not narrowly tailored. *Id.* at 507. The thirty percent minority subcontract requirement was chosen arbitrarily and had no relevant link to any number, except, perhaps, general racial balancing. *Id.* at 486, 507. Additionally, Richmond failed to first consider a race-neutral remedy. *Id.* at 507.

⁵⁸ *Id.* at 511.

⁵⁹ *Ricci*, 129 S. Ct. at 2672-73; see *supra* Part II.A-B.

⁶⁰ *Ricci*, 129 S. Ct. at 2673; see *supra* Part II.B.

⁶¹ *Ricci*, 129 S. Ct. at 2673-74 (emphasis added).

⁶² *Id.* at 2673-74.

⁶³ *Id.* at 2674.

⁶⁴ *Id.* at 2674-77. The firefighters first argued that disparate treatment is not defensible by an employer's attempt to avoid disparate impact. *Id.* at 2674. The Court refused to adopt this holding, asserting that only a rule that gives weight to both forms of discrimination will be accepted. *Id.* The firefighters next argued that employers must know with certainty that they have violated the disparate-impact prohibition before they may lawfully engage in disparate treatment as a remedy. *Id.* Yet, the Court again rejected this proposal, reasoning that requiring certainty would halt compliance efforts. *Id.* Alternatively, the City argued that good-faith compliance with the disparate-impact prohibition justifies intentionally discriminatory conduct. *Id.* at 2674-75. The Court also

reconciles disparate treatment and disparate impact by permitting the use of the former to comply with the prohibition against the latter only in limited circumstances.⁶⁵

Before laying out its holding, the Court limited the strong-basis-in-evidence standard to statutory Title VII claims.⁶⁶ The Court expressly stated that it did not decide whether meeting the standard would defeat a constitutional claim of discrimination under the Equal Protection Clause.⁶⁷ The Court then held that an employer cannot engage in intentional discrimination to remedy an unintentional disparate impact unless there is a strong basis in evidence that it will be subject to disparate-impact liability if it fails to take the discriminatory action.⁶⁸ There is a strong basis in evidence that the employer will be liable for disparate impact if the practice is not job related and consistent with business necessity, or an equally valid, less discriminatory practice exists that the employer could have used, but refused to adopt.⁶⁹

The Court then applied the holding to the facts of the case and awarded summary judgment to the firefighters.⁷⁰ The majority reasoned that the detailed job analyses performed by IOS, the efforts to ensure that minorities were overrepresented in the oral examinations, and the testimony of IOS competitor, Christopher Hornick, demonstrated that the exams were job related and consistent with business necessity.⁷¹ Moreover, according to the majority, no evidence of valid alternatives existed.⁷²

refused to accept the City's proposed good-faith rule, as such a rule would encourage employers to engage in discriminatory action and hastily dismiss test results with only minimal indication of disparate impact. *Id.* at 2675.

⁶⁵ *Id.* at 2676. The Court also reasoned that the strong-basis-in-evidence standard prevents employers from engaging in disparate treatment at the slightest hint of disparate impact, while not forcing them to wait until there is an actual disparate-impact violation. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2677.

⁶⁹ *Id.* at 2678.

⁷⁰ *Id.* at 2678-81.

⁷¹ *Id.* at 2678; see *supra* Part I and note 1.

⁷² *Ricci*, 129 S. Ct. at 2679-80. The City claimed that changing the weighting of the oral and written portions of the examination would have provided an alternative that allowed consideration of two black candidates. *Id.* at 2679. The Court, however, did not consider changing the weighting of the exam to be an equally valid alternative. *Id.* In

In its conclusion, the majority determined that the promotional examinations were related to job performance, and that equally valid, less discriminatory alternatives were unavailable.⁷³ Thus, the City fell short of demonstrating a strong basis in evidence that it would be subject to disparate-impact liability, and, consequently, set aside the test results in violation of Title VII.⁷⁴ Mere fear of litigation based on the statistical results of the promotional examination did not justify the injury sustained by those firefighters who had invested personal and financial resources in preparation for the exam.⁷⁵

B. Justice Scalia's Concurring Opinion

Agreeing fully with the majority, Justice Scalia noted that the decision did not address the constitutionality of disparate-impact provisions.⁷⁶ He argued that race-based remedial actions are inherently discriminatory.⁷⁷ Whereas the federal government is constitutionally prohibited from engaging in race-based discrimination under the Equal Protection Clause, its mandate of disparate-impact provisions results in discrimination by proxy.⁷⁸ Justice Scalia concluded his concurring opinion with a call to consider the impending conflict between disparate impact and the Constitution.⁷⁹

fact, changing test scores in this manner would also have likely resulted in a violation of Title VII. *Id.* But see *infra* note 89 and accompanying text. For similar reasons, the Court refuted the City's second suggested alternative of "banding," which allowed consideration of multiple candidates for each rank under "the rule of three." *Id.* at 2679-80; see also *supra* note 4 and accompanying text. Lastly, the Court deemed the use of assessment centers as an invalid alternative. *Ricci*, 129 S. Ct. at 2680. There was no evidence assessment centers were available as an alternative at the time of the examinations, nor was there any evidence that the assessment centers would have had a less discriminatory impact. *Id.* But see *infra* note 89 and accompanying text.

⁷³ *Ricci*, 129 S. Ct. at 2681. But see *infra* note 89 and accompanying text.

⁷⁴ *Ricci*, 129 S. Ct. at 2681.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2681-82 (Scalia, J., concurring).

⁷⁷ *Id.* at 2682.

⁷⁸ *Id.*

⁷⁹ *Id.* at 2683.

C. Justice Alito's Concurring Opinion

Justice Alito discussed disparate-treatment claims within the framework of a two-part, legitimacy analysis that contains both an objective and a subjective component.⁸⁰ Whereas the majority's holding and the dissent differ on the objective component, Justice Alito argued that even if the dissent had been adopted, the facts at hand would have nonetheless failed the subjective component.⁸¹

Justice Alito asserted that the dissent's analysis ignored significant facts that could have led a reasonable juror to find that the City's subjective intent was to "placate a politically important racial constituency," rather than the legitimate intent of avoiding disparate-impact liability.⁸² In forming his argument, Justice Alito relied on evidence that Rev. Boise Kimber, a politically influential African-American leader and longtime supporter of the Mayor, had influenced Mayor DeStefano and his executive officials to discard the test results.⁸³ Kimber had voiced his opposition to certification of the test results both privately to the Mayor's officials and at publicly-held hearings.⁸⁴ Justice Alito pointed to evidence in the record that the Mayor's office had decided to discard the test results prior to the CSB deliberations on the matter of disparate impact.⁸⁵ Consequently, Justice Alito argued that a reasonable juror could believe that fear of disparate-impact liability was merely a pretext for cloaking the City's real intent: appeasing a politically influential group.⁸⁶

⁸⁰ *Id.* (Alito, J., concurring). Justice Alito asserted that when an employer is subject to a disparate-treatment claim, the analysis begins by determining whether the objective reason for the employer's discriminatory action was legitimate. *Id.* The second part of the analysis focuses on whether the subjective intent of the employer was legitimate or merely a pretext for unjustifiable discriminatory action. *Id.* Justice Alito determined that the majority's holding fits within the objective analysis: if there was a strong basis in evidence that the employer would have been subject to disparate-impact liability, then the discriminatory action of the employer was legitimate. *Id.*

⁸¹ *Id.* at 2683-84.

⁸² *See id.* at 2684.

⁸³ *Id.* at 2684-85.

⁸⁴ *Id.* at 2684-86.

⁸⁵ *Id.* at 2686.

⁸⁶ *Id.* at 2687-88.

D. Justice Ginsburg's Dissenting Opinion

The dissent began with an assault on the majority's interpretation of the facts. Justice Ginsburg argued that the majority ignored the extensive history of discrimination in the profession of firefighting.⁸⁷ Her opinion attacked the ease with which the New Haven nonminority captain and lieutenant candidates obtained study materials, as opposed to their minority counterparts.⁸⁸ The dissent then discussed the City's failure to employ alternative testing methods such as changing the weighting of the written and oral portions of the examination or using assessment centers.⁸⁹ The dissent rounded out its initial discussion by rejecting the majority's view that the City's consideration of race in reviewing the test results was discriminatory.⁹⁰ Instead, the dissent concluded that the City's actions were "race-neutral," as all candidates were denied promotion and would have to engage in an alternative examination.⁹¹

The dissent then accused the majority of disregarding the holdings in *Griggs* and *Albemarle*.⁹² Supporting this claim, the dissent argued that the majority viewed disparate treatment

⁸⁷ *Ricci*, 129 S. Ct. at 2690-91 (Ginsburg, J., dissenting). In making this assertion, the dissent looked to congressional reports which revealed greater discrimination in the municipal sector, particularly in fire and police departments, than in the private sector. *Id.* at 2690. The dissent then pointed to data from the City demonstrating a disparity between minority percentages in the general population relative to the percentage of minority firefighters. *Id.* at 2691. The dissent argued that only litigation quelled this disparity. *Id.*

⁸⁸ *Id.* at 2693.

⁸⁹ *Id.* at 2691-95. In challenging the weighting of the written and oral portions of the examination, the dissent asserted that the percentage weight assigned to each portion of the exam had no correlation to job performance, but was merely a provision of the City's agreement with the firefighters' union. *Id.* at 2691. *But see supra* note 72 and accompanying text. The dissent relied on results from the nearby city of Bridgeport, which found that changing the weights to favor the oral portion of the exam not only bore a closer relation to "real-life scenarios," but also resulted in greater success for minority candidates. *Ricci*, 129 S. Ct. at 2693 (Ginsburg, J., dissenting). Furthermore, the dissent pointed to the testimony of Christopher Hornick, which indicated that assessment centers better identified the best possible candidates for the job and had less of a racially disparate impact. *Id.* at 2694. These facts stand in stark contrast to those emphasized in the majority. *See supra* note 72 and accompanying text.

⁹⁰ *Ricci*, 129 S. Ct. at 2696 (Ginsburg, J., dissenting).

⁹¹ *Id.*

⁹² *Id.* at 2696-98; *see also supra* Part II.B (discussing the facts and holdings of *Griggs* and *Albemarle*).

and disparate impact as adversarial prohibitions.⁹³ The dissent, however, asserted that *Griggs*, *Albemarle*, and subsequent codifications harmonize the two doctrines, giving each equal force.⁹⁴

After declaring disparate treatment and disparate impact as partners in achieving equal employment opportunity, the dissent asserted an alternative rule: where an employer has good cause to believe that a particular employment practice would not withstand scrutiny for business necessity, its decision to set aside the practice does not constitute disparate treatment.⁹⁵ Having proposed its own standard, the dissent began its assault on the majority's use of the strong-basis-in-evidence standard.⁹⁶

First, the dissent distinguished *Wygant* and *Croson* from the instant case.⁹⁷ Secondly, the dissent argued that the strong-basis-in-evidence standard essentially requires an employer to prove itself in violation of Title VII's disparate-impact provision before it may take action to remedy the situation.⁹⁸ Lastly, the dissent invalidated the majority's reasoning that the strong-basis-in-evidence standard protects an employee's reasonable reliance on the testing practice.⁹⁹

The dissent then applied its alternative standard to the facts and found that the disparity in the test results and the availability of equally valid, less discriminatory alternatives demonstrated that the City had good cause to believe it would

⁹³ *Ricci*, 129 S. Ct. at 2699 (Ginsburg, J., dissenting).

⁹⁴ *Id.* The dissent refers to the disparate-treatment and disparate-impact provisions of Title VII as "twin pillars," which "advance the same objectives." *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2701.

⁹⁷ *Id.*; see also *supra* Part II.C (discussing the facts and holdings of *Wygant* and *Croson*). The dissent reasoned that *Wygant* and *Croson* involved employment decisions that were solely race-based. *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting). Conversely, employers like those in the instant case are not engaging in race-based tactics; they are merely avoiding disparate-impact liability. *Id.*

⁹⁸ *Id.* at 2701-02.

⁹⁹ *Id.* at 2702. The dissent stated that it is not reasonable for an employee to rely on an exam that has a disparate impact and is not related to job performance. See *id.*

be subject to disparate-impact liability.¹⁰⁰ The dissent concluded by refuting Justice Alito's concurring opinion.¹⁰¹

IV. DISCUSSION

The Supreme Court's decision in *Ricci v. DeStefano* has both immediate intrigue and deep implications for the future. The fact-intensive nature of the case is readily apparent.¹⁰² The majority and dissent presented strikingly opposing interpretations of the facts, particularly with regard to the questions of whether the exam was job related and whether equally valid, less discriminatory testing alternatives existed.¹⁰³ Furthermore, Justice Alito's concurrence introduced facts that tended to demonstrate pretext, a matter absent from the majority's analysis and only addressed in rebuttal from the dissent.¹⁰⁴ The issue of pretext is a critical element of disparate-treatment analysis under *McDonnell Douglas*.¹⁰⁵ Yet, despite the divergent views of the facts and the presence of evidence raising a question of pretext, the Court granted summary judgment rather than remanding the case for hearing by a trier of fact.¹⁰⁶

The Court additionally took the novel approach of applying a constitutional standard to a statutory claim.¹⁰⁷ In so doing, the Court limited the circumstances in which an employer can utilize race-based remedial measures to comply with the Title VII disparate-impact provision.¹⁰⁸ An employer's race-based remedial actions are defensible under the second prong of *McDonnell Douglas* only if the employer is able to meet the much elevated

¹⁰⁰ *Ricci*, 129 S. Ct. at 2703-07 (Ginsburg, J., dissenting); see also *supra* note 89 and accompanying text (discussing the validity of alternative test methods).

¹⁰¹ *Ricci*, 129 S. Ct. at 2707-10; see also *supra* Part III.C (encapsulating Justice Alito's concurring opinion). The dissent argued that even if the Mayor and his officials were operating under the pretext of disparate-impact liability, the CSB was an independent board. *Ricci*, 129 S. Ct. at 2707-08.

¹⁰² See *supra* Part I.

¹⁰³ See *supra* notes 72, 89 and accompanying text.

¹⁰⁴ See *supra* notes 82-86, 101 and accompanying text.

¹⁰⁵ See *supra* Part II.A, note 33 and accompanying text.

¹⁰⁶ See *supra* note 70 and accompanying text.

¹⁰⁷ See *supra* notes 64-65 and accompanying text; see also *supra* Part II.C (discussing the equal protection origin of the strong-basis-in-evidence standard).

¹⁰⁸ See *supra* note 68 and accompanying text.

strong-basis-in-evidence standard.¹⁰⁹ This standard effectively places employers in the precarious position of either facing a disparate-impact suit or admitting to discriminatory testing procedures.¹¹⁰ The result is an erosion of the disparate-impact doctrine in light of Congress's express intent to give Title VII's disparate-impact provision effect.¹¹¹

On the horizon is the unanswered question of whether Title VII's disparate-impact provision is constitutional.¹¹² The *Ricci* Court expressly refused to extend its holding to a constitutional claim of discrimination under the Equal Protection Clause.¹¹³ Yet Justice Scalia warned that the day is approaching when the question must be answered.¹¹⁴ The majority suggested that when that day comes, a higher standard than that imposed by *Ricci* will apply.¹¹⁵ The imposition of a higher standard could completely extinguish Title VII's disparate-impact provision.¹¹⁶

With the Court presently divided five to four on the issue of whether disparate treatment and disparate impact are at odds, the future of disparate impact with regard to its constitutionality hinges on the theory of equality predominating the Court at the time the question is posed.¹¹⁷ If the colorblind theory of equality continues to prevail, disparate impact will likely not withstand constitutional scrutiny. On the other hand, if the majority of the Justices adopt the remedial theory of equality present in the dissent, disparate impact may yet survive.

¹⁰⁹ See *supra* notes 62-65 and accompanying text; see also *supra* Part II.A, note 32 and accompanying text (discussing business justifications for race-based employment actions under *McDonnell Douglas*).

¹¹⁰ See *supra* note 98 and accompanying text.

¹¹¹ See *supra* notes 38-39 and accompanying text.

¹¹² See *supra* Part III.B.

¹¹³ See *supra* note 67 and accompanying text.

¹¹⁴ See *supra* Part III.B.

¹¹⁵ See *supra* note 67 and accompanying text.

¹¹⁶ See *supra* Part III.B.

¹¹⁷ See *supra* notes 93-94 and accompanying text; see also GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 16, 23 (2001) (describing both the colorblind and remedial theories of equality). The colorblind theory of equality prohibits race from being a factor in employment decisions, regardless of motive; whereas the remedial theory of equality seeks to right past wrongs by "compensat[ing] for present disadvantages." RUTHERGLEN, *supra*, at 16-17, 23.

CONCLUSION

In *Ricci v. DeStefano*, the Supreme Court held that before employers may take race-based remedial action to cure a practice that has a disparate impact, the employer must have a strong basis in evidence to believe that failure to use the race-conscious remedy will result in exposure to disparate-impact liability. Through its decision, the Court dramatically narrowed the instances in which an employer may use race-based remedies to comply with Title VII. Although the question remains open as to whether Title VII's disparate-impact provision is constitutional, it is apparent that the majority's decision weakened the doctrine of disparate impact.

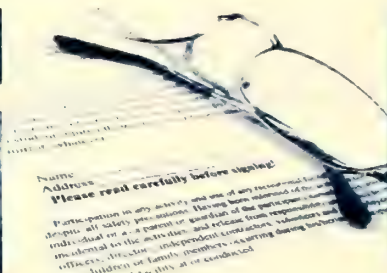
*Nathan L. Barrett**

* J.D. Candidate, University of Mississippi School of Law, 2011; B.S., Purdue University, 2000. I thank my Savior, the Lord Jesus Christ, for the gift of legal scholarship. All of the glory goes to Him. Second only to Christ, I thank my wife, Kari Sue Barrett, for her deep love and unending encouragement without which I would not be where I am today. Thank you to my mother, Teresa A. Noah, for guiding me through the spiritual battlefield. Thanks goes as well to Professor William W. Berry, III for imparting his expertise in employment discrimination law on a newcomer to the field. This note is dedicated to my grandparents, Joe and Thelma McCreary. Thank you for your Christian example.



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IN MEMORY OF GRETCHEN J. HARRIS

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IN MEMORIAM



This issue of the *Mississippi Law Journal* is dedicated in memory of Gretchen J. Harris.

Gretchen passed away January 25, 2010 in St. Louis, MO. A Class of 2009 graduate, Gretchen served as Executive Articles Editor for Volume 78 publications. Last year, Gretchen's peers awarded her the Robert C. Khayatt scholarship in recognition of her dedicated service to the *Mississippi Law Journal*. Her contributions included scholarship as well as leadership. Volume 78, Issue 4 featured a comment authored by Gretchen.

Gretchen's commitment to the *Mississippi Law Journal* has greatly improved the quality of this publication. She will be sorely missed.



POST-TRAUMATIC STRESS DISORDER & THE MILITARY JUSTICE SYSTEM

*Peyton Cooke**

I remember about myself a loneliness and poverty of spirit; mental collapse; brief jovial moments after weeks of exhaustion; discomfiting bodily pain; constant ringing in my ears; sleeplessness and drunkenness and desperation; fits of rage and despondency; mutiny of the self; lovers to whom I lied; lovers who lied to me. I remember going in one end and coming out the other. I remember being told I must remember and then for many years forgetting.

Anthony Swofford, Lance Corporal, USMC¹

INTRODUCTION

Combat causes Post-Traumatic Stress Disorder (PTSD). Modern psychiatrists have identified its symptoms as early as the Trojan War.² When the military fights wars, it performs a vital national function; but in doing so, contributes to a diagnosable psychological malady in its warriors (the enemy is of course primarily responsible). The military has started to recognize both the severity of PTSD, and its obligations to troops sent into combat. As a nation, we ought to commend the military for

* Assistant Professor of Law and Head, Environmental Policy Center, Haramaya University College of Law (Ethiopia); Adjunct Professor, University of Alabama School of Law. B.A., The College of William and Mary; J.D., Vanderbilt University Law School. The author wishes to thank his fellow faculty at the Haramaya University College of Law for their kind support, and the editors at the Mississippi Law Journal for their equally kind assistance.

¹ ANTHONY SWOFFORD, *JARHEAD: A MARINE'S CHRONICLE OF THE GULF WAR AND OTHER BATTLES* 3 (2003).

² Geraldine L. Brotherton, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 92 (1981).

taking these steps, especially in light of the military's traditional prejudice against psychiatric treatment.³

But it is a sad fact that these same steps create major problems for the Military Justice system. First, they raise issues as to how the military ought to punish offenders, whether for disciplinary offenses with no counterpart in civilian law, or for more traditional criminal offenses. Second, these steps change the relationship between psychotherapist, patient, and commanding officer and directly raise questions about how military personnel relate to both their superiors and to the military as a whole.

The effects of PTSD make it very hard to maintain military discipline and lead directly to the commission of more disciplinary offenses. Yet in punishing disciplinary offenses, the military explicitly seeks not only to punish, but also to rehabilitate the offender⁴—which is to say, to restore and improve discipline. This creates a dilemma: the military contributes to a condition that leads to disciplinary offenses, and then must punish and rehabilitate those who have committed the offenses. Such a dilemma lends itself to legal and philosophical discussions on the nature of punishment, which this paper addresses.

Furthermore, as psychotherapists become more and more integrated (and important) in the military, their independence and ability to preserve confidentiality starts to disappear. They begin to become an arm of the command, and cease being independent caregivers. So while the military's reforms may reap benefits (an optimistic conclusion this paper questions), they will certainly create problems—and possibly detriments—in the

³ The Operation Iraqi Freedom (OIF) Mental Health Advisory Team (MHAT) identified several barriers "that impede Soldiers from obtaining behavioral health assistance," and noted, "Perceived stigma to care was also an important concern for OIF Soldiers. Soldiers reported that they might be seen as weak (59%), that the unit leadership would treat them differently (58%), that the unit would have less confidence in them (49%), or that their leaders would blame them for the problem (46%)." U. S. ARMY SURGEON GEN. & HQDA G-1, OIF MHAT REPORT (2003), available at www.globalsecurity.org/military/library/report/2004/mhat_report.pdf [hereinafter MHAT-I].

⁴ See *infra* note 61 and accompanying text.

Military Justice system. This is especially true for the Military Justice psychotherapist-patient privilege.⁵

As if to illustrate just this problem, in 2006, the Court of Appeals for the Armed Forces (CAAF) reserved the question on how the duties of military psychiatry relate to psychotherapist-patient privilege.⁶ From the text of the relevant Military Rules of Evidence, service instructions, Department of Defense Directives, and military justice precedents, the answer to that question—and to other questions of military psychiatry and military justice—are simply unclear. On the one hand, the relevant texts, read in a straightforward manner, seem to vitiate the privilege. On the other, the purpose behind those texts and the traditions of military justice (not to mention precedents in military case law) seem to uphold it. This paper does not propose to offer final, platonically perfect answers. It does, however, seek to outline a number of the relevant problems, and contribute to reaching reasonable solutions. Indeed, the current issues of PTSD and psychotherapist-patient privilege in the military can profitably serve as a “hook” for discussing a number of far larger issues, such as the relationship between commanding officers and enlisted military members; the effects of warfare on the minds of soldiers, sailors, and airmen; and what place, if any, confidentiality can have in a modern military.

This paper’s argument thus proceeds in three parts. The first part addresses PTSD as a psychiatric disease, and especially its close relationship to combat. This part concludes by addressing the changed doctor-patient-commander relationship in the military. The second part seeks to establish a framework for analyzing and discussing the Military Justice System, and how PTSD relates to punishment of minor disciplinary offenses. Special attention is paid to the impact of military members’ mental health, and how it both leads to, and provides a defense for, infractions against the Uniform Code of Military Justice (UCMJ).⁷ Finally, it offers philosophical (Kantian) and legal ra-

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (2008), *available at* <http://www.jag.navy.mil/documents/mcm2008.pdf> [hereinafter MCM].

⁶ United States v. Jenkins, 63 M.J. 426, 429 (C.A.A.F. 2006).

⁷ 10 U.S.C. §§ 801-946 (2006).

tionales for treating PTSD *concurrently with* meting out punishment.

The paper's third part is also its longest. It deals with the problems PTSD raises in more serious offenses, particularly psychotherapist-patient privilege in courts-martial. The paper further examines how recent military rules, regulations, and reforms have changed the relationship between psychotherapists, patients, and commanding offers. It then presents a specific example of this changed relationship: psychotherapist-patient privilege in the armed forces. This paper contends that recent Department of Defense Directives and other Military Justice materials have probably eliminated psychotherapist-patient privilege in the military without intending to do so. Nevertheless, courts-martial have developed a robust, independent tradition of rights-protection—almost entirely ignored in the scholarly literature—that provides a powerful justification for maintaining the privilege.

I. THE NATURE OF POST-TRAUMATIC STRESS DISORDER STEM- MING FROM COMBAT: CHARACTERISTICS AND CURRENT PREVALENCE IN MILITARY MEMBERS DEPLOYED TO IRAQ

A. *The Characteristics of PTSD, and Its Relationship to Combat*

The essential feature of Post-Traumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury [C]haracteristic . . . symptoms [include] persistent reexperiencing of the traumatic event . . . , persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness ["psychic numbing"] . . . , and persistent symptoms of increased arousal

. . . .

. . . . These symptoms may include difficulty falling or staying asleep that may be due to recurrent nightmares during which the traumatic event is relived . . . , hypervigilance . . . ,

and exaggerated startle response Some individuals report irritability or outbursts of anger ⁸

Suffering from PTSD also correlates highly with “Panic Disorder, Agoraphobia, Obsessive-Compulsive Disorder, Social Phobia, Specific Phobia, Major Depressive Disorder, Somatization [sleep-related] Disorder, and Substance-Related Disorders.”⁹ Military combat is one of the classic causes of PTSD.¹⁰ The DSM-IV goes on to say, “The disorder may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape). The likelihood of developing this disorder may increase as the intensity of and physical proximity to the stressor increase.”¹¹ One would expect combat with these features to increase the incidence of PTSD. Indeed, other studies have indicated that specific combat experiences worsen both the prevalence and severity of PTSD. Combat injury, even if relatively minor, precipitously increases both the serviceman’s likelihood of developing PTSD (by a factor of about eight-to-one), and his or her likelihood of developing the most severe forms of PTSD.¹² Seeing or handling human remains also dramatically increases the severity of any PTSD the service member may experience.¹³

PTSD may strike months, or even years, after a soldier’s combat exposure. In a study of Persian Gulf War veterans, service members were screened for PTSD at one, six, and twenty-four months after returning home and were found to have “progressive increases in PTSD symptoms.”¹⁴ Moreover, “those cases that screened positive at one month continued to screen positive

⁸ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424-425 (4th ed. 1994) [hereinafter DSM-IV].

⁹ *Id.* at 425.

¹⁰ *Id.* at 426.

¹¹ *Id.* at 424.

¹² Danny Koren et al., *Increased PTSD Risk with Combat-Related Injury: A Matched Comparison Study of Injured and Uninjured Soldiers Experiencing the Same Combat Events*, 162 AM. J. PSYCHIATRY 276, 276-82 (2005).

¹³ James E. McCarroll et al., *Symptoms of PTSD Following Recovery of War Dead: 13-15 Month Follow-Up*, 152 AM. J. PSYCHIATRY 939, 939-41 (1995).

¹⁴ Stephen J. Cozza, *Combat Exposure and PTSD*, 16 PTSD RESEARCH Q. 1, 2 (Winter 2005).

for PTSD at 2 years.”¹⁵ PTSD symptoms may come and go for an even larger group. Currently 15.2% of male Vietnam theater veterans are diagnosed with PTSD, while more than twice as many, 30.9%, have experienced PTSD at some point during their lifetimes.¹⁶

*B. The Prevalence of PTSD in Operation Iraqi Freedom (OIF)
Military Members*

The Office of the Surgeon Multinational Force-Iraq, Office of the Surgeon General, and United States Army Medical Command have, since the inception of OIF, issued several Mental Health Advisory Team (MHAT) reports.¹⁷ MHAT-IV was published in 2007, and covers the period from 2005-2007 (OIF 05-07). The study found that 17% of OIF 05-07 soldiers, and 14% of marines screened positive for acute stress.¹⁸ Additionally, in the previous MHAT report (OIF 04-06), 17% of respondents screened positive for a combination of depression, anxiety, and acute stress, symptoms that correlate very highly, and indeed nearly define, PTSD.¹⁹ Military members who had undergone multiple deployments evinced higher levels of acute stress, no-

¹⁵ *Id.*

¹⁶ NATIONAL CENTER FOR PTSD, U.S. DEP'T FOR VETERANS AFFAIRS, EPIDEMIOLOGICAL FACTS ABOUT PTSD, *available at* <http://www.ptsd.va.gov/professional/pages/epidemiological-facts-ptsd.asp> [hereinafter National Center for PTSD] (last visited Mar. 30, 2010).

¹⁷ Since this article was drafted, at least two new reports have been issued, covering the period since 2007. The author's research does not include statistics from these reports, but it is safe to say, given the upward trend in PTSD diagnoses, that subsequent and future reports will further support the author's conclusions. See U.S. Army Medical Command, Mental Health Reports (OIF), *available at* <http://www.armymedicine.army.mil/reports/mhat/mhat.html> (last visited Mar. 30, 2010).

¹⁸ OFFICE OF THE SURGEON MUTINAT'L FORCE-IRAQ & OFFICE OF THE SURGEON GEN. U.S. ARMY MED. COMMAND, MENTAL HEALTH ADVISORY TEAM (MHAT) IV, OPERATION IRAQI FREEDOM 05-07 FINAL REPORT 20 (2006), http://www.armymedicine.army.mil/reports/mhat/mhat_iv/MHAT_IV_Report_17NOV06.pdf [hereinafter MHAT-IV].

¹⁹ OFFICE OF THE SURGEON MUTINAT'L FORCE-IRAQ & OFFICE OF THE SURGEON GEN. U.S. ARMY MED. COMMAND, MENTAL HEALTH ADVISORY TEAM (MHAT) III, OPERATION IRAQI FREEDOM 04-06 REPORT 6, 20 (2006), http://www.armymedicine.army.mil/reports/mhat/mhat_iii/MHATIII_Report_29May2006-Redacted.pdf [hereinafter MHAT-III]. Respondents in OIF 05-07 were not screened for this combination of symptoms, although those screenings that were repeated tended to show slight increases in stress, depression, etc. MHAT-IV, *supra* note 17, at 20.

tably 24%.²⁰ The RAND corporation recently released its own report on psychiatric disorders in the military, which broadly agrees with the MHAT findings.²¹

Because of the nature of the conflict, military members were also exposed to the combat conditions most likely to cause the most severe forms of PTSD.²² During OIF 05-07, 62% of marines and 66% of soldiers knew someone who was seriously injured or killed; 52% and 53%, respectively, had a member of his or her own unit become a casualty; 41% and 42% had seen dead or seriously injured Americans;²³ 45% and 46% were in threatening situations where they did not know how to respond under the Rules of Engagement;²⁴ and 58% and 62% had been exposed to an Improvised Explosive Device (IED) or other booby trap (which, by their very nature, must be set off in close physical proximity to their intended targets).²⁵ Given the indiscriminate nature of the enemy's tactics,²⁶ and that the enemy often targets civilians and not military personnel,²⁷ one can also assume that a high percentage of American service members would have seen and handled dead or mutilated Iraqi noncombatants and their body parts. Once again, the RAND Study basically concurred with these results.²⁸

²⁰ MHAT-IV, *supra* note 17, at 23.

²¹ INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY (Terri Tanielian & Lisa H. Jaycox, eds., RAND Corp. 2008) [hereinafter RAND Study]. For instance, RAND found that 14% of those deployed in Operation Iraqi Freedom screened positive for PTSD, using RAND's test. *Id.* at 96.

²² See DSM-IV *supra* note 8, at 424. Such factors include those where the "stressor is of a human design," where the soldier has been injured, where the soldier has experienced close physical proximity to a life-threatening situation, and where the soldier has seen or handled human remains. *Id.*

²³ MHAT-IV, *supra* note 17, at 15.

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ See, e.g., Richard A. Oppel, Jr. & Qais Mizher, *At Least 130 Die as Blast Levels Baghdad Market*, N.Y. TIMES, Feb. 4, 2007, available at <http://www.nytimes.com/2007/02/04/world/middleeast/04iraq.html?ref=world>.

²⁷ *Id.* (killing only civilians, "[it] was the deadliest bomb blast" since the American occupation began).

²⁸ See RAND Study, *supra* note 20, at 5 ("The day-to-day activities of troops in combat vary widely, but some common stressors [are] roadside bombs, IEDs, suicide bombers, the handling of human remains, killing an enemy, seeing fellow soldiers and friends dead or injured, and the helplessness of not being able to stop violent situations . . ."); *id.* at 25-27 (discussing the use and spread of IEDs in the Iraqi conflict); *id.* at 97 tbl.4.3

Given the above statistics, a tragically high percentage of Americans serving in OIF will probably develop the most severe forms of PTSD, those most disruptive to normal life, and those most likely to cause traumatic flashbacks, exaggerated startle responses, and violent outbursts. The implications for military discipline and military justice will be profound.

II. THE DEEPENING RELATIONSHIP BETWEEN COMMANDING OFFICERS, ENLISTED PERSONNEL, AND MILITARY PSYCHOTHERAPISTS

Over the years, the military has developed a well-established treatment regimen. It has not, however, traditionally included modern psychiatric care. The military has started to address this problem, and formal psychiatric care has recently become a much larger part of its treatment regimen. Yet the military's new approach has also created new problems.

To wit, the military has traditionally put the commanding officer in the role of primary psychiatric caregiver. Such a position gave the commanding officer both access to a great deal of power over the personnel he commands, and a great deal of information about them. Today, even though trained psychotherapists are now more involved in treatment, the commanding officer has maintained the traditional prerogatives in the psychiatric care of those under his or her command. Paradoxically, as the psychiatric evaluation of military members increases, their privacy and confidentiality decrease. Such a process puts the rights of service members and the existence of psychotherapist-patient privilege in serious doubt.

A. The Current (Modified-Traditional) Approach to PTSD Treatment

The military's basic approach to treating PTSD developed long before the disorder was recognized as such. Due to the huge number of soldiers who had to be evacuated due to combat

(reporting that: 49.6% of military members surveyed reported "[h]aving a friend who was seriously wounded or killed"; 45.2% "[s]eeing dead or seriously injured noncombatants"; etc.).

stress during World War I, the military developed the concept of “forward psychiatry,” as exemplified by the acronym with which it is constantly intertwined—PIE—standing for “proximity (treatment close to the battlefield), immediacy (rapid and readily available intervention), and expectancy (belief that the soldier would return to combat).”²⁹ There is some evidence to support this system’s effectiveness. For instance, an Israeli study showed that soldiers treated under principles similar to PIE had a higher return-to-duty rate than those treated at base hospitals.³⁰ However, evidence also exists that the military has overstated the positive results from PIE, and “[i]t remains uncertain who is being served by the intervention . . . the individual soldier or the needs of the military.”³¹

Forward psychiatry finds its incarnation in today’s American military under another acronym, BICEPS, which stands for:

Brevity ([return the soldier to duty in] usually less than 72 hours); Immediacy (as soon as symptoms are evident); Centrality of management (in a centralized CSC [Combat Stress Control] unit separate from, but proximal to, a medical unit); Expectancy (CSC unit personnel expectation that casualties will recover); Proximity (of treatment at or as near the front as possible); and Simplicity (the use of simple measures such as rest, food, hygiene and reassurance).³²

In this system, the front line in the battle against combat stress is not CSC mental health personnel, but commanding officers, who are tasked with “primary prevention” of combat stress through “leadership, communication, unit cohesion, and morale.”³³ And commanders are to receive training—commonly called Resilience Training³⁴—before, during, and after deploy-

²⁹ Cozza, *supra* note 14, at 1.

³⁰ Edgar Jones & Simon Wessely, “Forward Psychiatry” in the Military: Its Origins and Effectiveness, 16 J. TRAUMATIC STRESS 411, 411 (2003).

³¹ *Id.*

³² U.S. DEP’T OF DEFENSE., DIR. 6490.5, COMBAT STRESS CONTROL (CSC) PROGRAMS para. E1.1.1 (23 Feb. 1999) [hereinafter DOD DIR. 6490.5].

³³ *Id.* at para. 4.9.2.2.

³⁴ See, e.g., Walter Reid Army Institute of Research, Resilience Training Overview (22 Feb. 2010), <https://www.resilience.army.mil/About/ResilienceTrainingOverview22Feb10.pdf> (last visited Mar. 30, 2010).

ment that focuses on “leadership, communication with troops, unit morale and cohesion, and individual psychosocial stressors.”³⁵ On the one hand, this approach makes a great deal of intuitive sense. Of course soldiers will be in better psychological health in an environment of high morale and cohesion, and with communicative leadership whom they trust. Moreover, it is doubtful that the military would have for so long employed PIE-like principles if they were not effective in returning a soldier to combat readiness in the short term.

On the other hand, these programs raise at least two major objections. First, a military officer, no matter how effective a leader and communicator, is not a psychiatrist. Except by acquiring real-world experience, an officer will probably not be able to accurately and consistently identify significant PTSD symptoms such as “psychic numbing,” and hence, will not be able to address these symptoms in a timely fashion. Second, and more importantly, PIE-like treatments make little or no provision for the soldier’s long-term mental health. The worst symptoms of PTSD may delay onset for months,³⁶ and require both the attention of a professional therapist, and the prescription of medication. It is worth noting, in this context, that the *Iraq War Clinician Guide* recommends a course of treatment far more intimate and long-term than would be possible under BICEPS.³⁷

³⁵ DOD DIR. 6490.5, *supra* note 31, para. 4.9.1.

³⁶ Cozza, *supra* note 14, at 3.

³⁷ NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER & WALTER REED ARMY MED. CTR., U.S. DEPT OF VETERANS AFFAIRS, IRAQ WAR CLINICIAN GUIDE (2d ed. 2004), *available at* http://www.ptsd.va.gov/professional/manuals/manual-pdf/iwgc/iraq_clinician_guide_v2.pdf [hereinafter IRAQ WAR CLINICIAN GUIDE]. For instance, the Guide recommends a course of treatment for PTSD far different than BICEPS. It recommends intensive therapy and deep clinician involvement in the patient’s readjustment to life away from a war zone; exposure therapy where the patient re-experiences a simulation of his or her trauma in a safe environment; “cognitive restructuring” where the patient systematically learns to associate new responses to the negative thoughts associated with the trauma; and family counseling. *Id.* at 37-38. More importantly, the Guide asserts that “[i]f Iraq War veterans arrive at VA Medical Centers very soon (i.e. within several days or several weeks) following their trauma exposure, it is possible to use an early intervention to try to prevent development of PTSD.” *Id.* at 39. Such recommendations directly contradict the BICEPS goals, most notably the goal of returning the soldier to combat duty within seventy-two hours. *See supra* note 31. Even more worrisome, this same contradiction suggests that, by returning the soldier to combat duty within seventy-two hours instead of evacuating him or her to a VA facility

However, effectiveness aside, PIE, BICEPS, and the principles they embody unequivocally put the commanding officer in charge of the enlisted person's mental health care. As long as the commanding officer remains in a traditional role, few problems result. But, as psychiatric care increases in importance in the military—as the next section will discuss—so will the role, and power, of the commanding officer.

B. Two (Possible) Recent Improvements in Military Mental Health Care . . .

While BICEPS remains the primary treatment approach, and officers the primary caregivers, the military has announced policies that will increase the importance—and, one hopes, the effectiveness—of military psychiatric care. First, the military has announced a policy of medically screening all troops before deployment to Iraq and Afghanistan, and at least once upon return.³⁸ Second, MHAT-III has reported both an increase in the ease with which soldiers could receive mental health services, and a decline in the traditional prejudice of military members against psychiatric treatment (for fears that seeking treatment it would make them seem “weak” or “unfit for service”).³⁹ As a result, the report concluded, 30% of OIF 04-06 soldiers received behavioral health care while deployed, as opposed to only 23% during OIF 02-04.⁴⁰

MHAT-IV did not duplicate these results, but there can be no doubt of the increasing prominence of military psychiatric care. Most importantly, the military has instituted what is known as the RESPECT-MIL program, designed to increase awareness of PTSD and related psychological ailments among the military's primary care physicians.⁴¹ Of course, only those

for early intervention, the military will cause some cases of PTSD that could have been prevented.

³⁸ Sergeant Sara Wood, *Military Health Care Making Advances*, AM. FORCES PRESS SERV., Dec. 13, 2006, available at <http://www.veteransadvantage.com/cms/content/military-health-care-making-advances> (last visited Mar. 30, 2010).

³⁹ MHAT-III *supra* note 18, at 25.

⁴⁰ *Id.* at 23.

⁴¹ U.S. ARMY MEDICAL COMMAND, OPERATION ORDER 07-34, RE-ENGINEERING SYSTEMS OF THE PRIMARY CARE TREATMENT (OF DEPRESSION AND PTSD) IN THE MILITARY (RESPECT-MIL) (Jan. 2007) [hereinafter OPORD 07-34] (on file with author);

active-duty soldiers who report to primary care physicians are screened,⁴² meaning those who do not report at all receive no screening.⁴³ Nevertheless, this program will hugely expand psychiatric screening of military members, and the statements and announcements coming from senior military leadership only confirm this new emphasis.⁴⁴

C. . . . And the Problems They Create

Yet these increased screenings come with a problem: the soldiers' commander receives the results of all mental health screenings of his or her troops.⁴⁵ On the one hand, a screening, if kept confidential, is incapable of aiding either a commander in unit management, or an army in evaluating the mental health of its troops. In short, a confidential screening is useless. On the other hand, revealing the results of the screening destroys doctor-patient confidentiality, at least in the practical sense; the relevant DOD Instruction even requires the MHP to inform the soldiers that the consultation will not be confidential.⁴⁶ Thus, at least some soldiers will not give candid statements to the MHP, and, consequently, the MHP will inevitably give a somewhat inaccurate evaluation to the unit commander. And, more importantly, this changes the relationship of the commanding officer, patient, and psychotherapist. Put simply, if the psychotherapist must report the results of mental health evaluations to commanding officers, this action might destroy psychotherapist-patient confidentiality (as will be discussed at length below).

see also Welcome to the RESPECT-MIL Program, <http://www.pdhealth.mil/respect-mil.asp> (last visited Mar. 30, 2010). The Order provides: "All [Active Duty] patients are screened for depression and PTSD . . . as part of the clinic check-in and vital signs assessment at designated primary care clinics." OPOD 07-34 para. 3.d(2)(a).

⁴² RAND Study, *supra* note 20, at 108.

⁴³ RAND estimates that only half of those needing care receive it, and only 30% of those who do report for treatment receive adequate care. *Id.* at 101.

⁴⁴ See, e.g., Virginia Reza, Chief Says Army Needs to Replicate Bliss PTSD Program, ARMY.MIL/NEWS, July 18, 2008, available at <http://www.army.mil/news/2008/07/18/11001-chief-says-army-needs-to-replicate-bliss-ptsd-program> (last visited Mar. 30, 2010).

⁴⁵ U.S. DEP'T OF DEFENSE., INSTR. 6490.4: REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES para. 4.6 (28 Aug. 1997) [hereinafter DODI 6490.4].

⁴⁶ *Id.* para. 6.1.3.3.

Moreover, not only are psychotherapists required to report their findings to commanding officers,⁴⁷ but the military has identified commanding officers as (at least initially) in charge of the mental health of the troops.⁴⁸ So these two positions—commanding officer and psychotherapist—have become increasingly blended, as the first assumes the role of the second, and the second must report his or her findings to the first.

Yet, as stated above, each of these positions has distinct legal duties to, and power over, troops under his or her care. In theory, separation between them should help protect the soldier from arbitrary or (unjustly) punitive actions based on his or her supposed mental health. Again, in theory, giving both treating physicians and military commanders some say over the soldier's mental health care should provide the soldier with two "levels" of process. But this overlooks the extent to which the psychotherapist is subservient to the military commander: the psychotherapist must report to the commander, not the other way around.⁴⁹ And to the extent commanding officers and psychotherapists merge, commanding officers can assume the powers of military psychotherapists, and hence assume a set of powers and degree of control over service members which neither Congress (which issues rules governing the armed forces)⁵⁰ nor the Executive (who is Commander-in-Chief)⁵¹ has contemplated. Psychotherapists might also expand their powers, but given the hierarchical nature of the military—and that commanding officers occupy the top of that hierarchy—this seems less likely. The military's recent focus on improving mental health care might have inadvertently expanded commanding officers' power beyond its legal limits. This certainly does not look pretty: while not significantly expanding access to mental health care, the military has nevertheless created new legal problems for both itself and its members.

It is difficult, however, to determine the precise content of a military member's rights, especially Constitutional rights. This

⁴⁷ *Id.* para. 6.1.3.5.

⁴⁸ *Id.* para. 6.1.1.1.

⁴⁹ *Id.* para. 6.1.3.5.

⁵⁰ U.S. CONST., art. I, § 8, cl. 14.

⁵¹ U.S. CONST., art. II, § 2.

paper, therefore, will confine itself to military members in the military justice system in general, and those seeking to invoke psychotherapist-patient privilege in particular. With this in mind, this paper will move on to a brief overview of the former topic, and then on to an analysis of the latter topics.

III. PTSD AND MINOR MILITARY JUSTICE INFRACTIONS: BETWEEN REHABILITATION AND PUNISHMENT

Because of the nature of military society and the needs of military discipline, the armed forces have established several levels of infraction and punishment. This section primarily addresses those UCMJ infractions that one could describe as “disciplinary,” which is to say, those infractions against the maintenance of military discipline—infractions with no precise analogs in the civilian justice system.⁵² As the following parts will outline, PTSD, because of its symptoms, can greatly disrupt military discipline. As a result, this paper recommends a disciplinary system that, for reasons both philosophical and practical, combines separate elements of rehabilitation and punishment.

But, in order to contextualize these disciplinary offenses and lay some groundwork for subsequent arguments, this section begins with an overview of the military justice system in both its disciplinary and criminal components.

A. Preliminary Overview of the Military Justice System

The military justice system operates on essentially three levels: Nonjudicial Punishment (NJP); Special Courts Martial (SCM); and General Courts Martial (GCM).⁵³ The first two serve

⁵² See *infra* notes 62-69 (explaining the term “disciplinary” and a list of such offenses).

⁵³ See generally, AIR FORCE JUDGE ADVOCATE GEN. SCH., THE MILITARY COMMANDER AND THE LAW, chs. 2, & 4 (2009), available at <http://milcom.jag.af.mil/>. Additionally, commanding officers may employ administrative action, which may address some of the same issues as military justice, but is conceptually distinct and more akin to an employer’s reprimand. See *id.* at 25 (“Counselings, admonitions, and reprimands are quality force management tools . . . designed to improve, correct, and instruct those who depart from standards of performance, conduct, bearing, and integrity and whose actions degrade the individual and unit’s mission. These tools are corrective in nature, not punitive.”); *id.* at 37 (“An administrative demotion is another quality force management

to reprimand military members for what would generally be misdemeanor offenses (in the civilian world) or breaches of military discipline, while the latter addresses what civilians would think of as felonies.⁵⁴ In either case, it is, by custom as much as law, the accused's commanding officer who files ("prefers" in military terminology) charges.⁵⁵ He, not the Staff Judge Advocate, possesses "prosecutorial discretion."⁵⁶ These three levels of the system are described in greater detail below.

Article 15, UCMJ delegates to commanders (officers) the authority to impose NJP on soldiers serving under them, as long as the soldier so consents.⁵⁷ Soldiers always have the right to demand a Court Martial, where the standard of proof is "beyond a reasonable doubt."⁵⁸ As David A. Schlueter writes in his treatise *Military Justice: Practice and Procedure*, "The nonjudicial punishment option is one of those always available to a commander in exercising his prosecutorial discretion. The seriousness of the offense . . . reduces the likelihood that nonjudicial punishment will be offered"⁵⁹ The service branches strictly regulate what punishment the commander may give, based on both the commander's rank, and the rank of the accused. To use an example from the Air Force, if a low-ranking airman were caught pilfering a video game from the base store, his commanding Lieutenant could impose a punishment of forfeiture of seven days pay, but no more.⁶⁰

However, as above, the accused may always demand a Court Martial, either Special or General, depending on the gravity of the offense. Special Courts Martial handle those minor issues that could also be dealt with by NJP,⁶¹ while General

tool," but should not be used "when it is more appropriate to take action under the Uniform Code of Military Justice.").

⁵⁴ *Id.* at 166.

⁵⁵ DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 3-3(A) (6th ed. 2004).

⁵⁶ *Id.* §§ 6-1, 301 n.4. Technically, any person subject to the UCMJ may prefer charges against any other person subject to the UCMJ. See *THE MILITARY COMMANDER AND THE LAW*, *supra* note 52, at 160.

⁵⁷ UCMJ ART. 15 (2006).

⁵⁸ *THE MILITARY COMMANDER AND THE LAW*, *supra* note 52, at 55.

⁵⁹ SCHLUETER, *supra* note 54, § 3-3(A), n.4.

⁶⁰ *THE MILITARY COMMANDER AND THE LAW*, *supra* note 52, at 59 tbl.3.1.

⁶¹ SCHLUETER, *supra* note 54, § 4-3(B).

Courts Martial handle more serious offenses.⁶² I will use the term “disciplinary” to refer to those minor matters handled either by NJP or Special Court Martial. I have chosen the term because the stated goal of the Military Justice system in handling these offenses is not to punish the soldier, but to rehabilitate him and maintain unit discipline.⁶³

B. A Brief Overview of Disciplinary Offenses

Schlueter divides disciplinary offenses into nine general categories: absence offenses;⁶⁴ disrespect offenses;⁶⁵ disobedience offenses;⁶⁶ conduct unbecoming an officer;⁶⁷ the general article;⁶⁸ drug offenses;⁶⁹ fraternization;⁷⁰ and AIDS and HIV-Related offenses.⁷¹

⁶² *Id.* § 4-3(A); see also ESTELA I. VELEZ POLLACK, CONG. RESEARCH SERV., MILITARY COURTS-MARTIAL: AN OVERVIEW 5 (2004), available at <http://www.fas.org/man/crs/RS21850.pdf> (“A general court-martial is the highest trial level in military law and is usually used for the most serious offenses”).

⁶³ UCMJ, arts. 85-87.

⁶⁴ *Id.* arts. 89, 91.

⁶⁵ *Id.* art. 90 (disobedience of a superior’s orders); *id.* art. 91 (disobedience of orders of warrant, petty or noncommissioned officer); *id.* art. 92 (disobedience of orders or regulations).

⁶⁶ *Id.* art. 133; See, e.g., *United States v. Page*, 43 M.J. 804 (A.F. Ct. Crim. App. 1995) (denigrating the marital relationship of an enlisted subordinate erodes confidence in command and is thus conduct unbecoming an officer).

⁶⁷ UCMJ art. 134. There are three subsections to the article: (1) conduct to the prejudice of good order and discipline in the armed forces; (2) conduct of a nature to bring discredit upon the armed forces; (3) conduct violating federal or state laws. *Id.*

⁶⁸ *Id.* art. 112(a). Traditionally, drug offenses were charged under either article 92 (disobedience), or article 134 (the general article), and offenses not covered by article 112(a), such as the possession of drug paraphernalia, are still so charged. SCHLUETER, *supra* note 54, § 2-7(A).

⁶⁹ Fraternization generally refers to consensual sexual contact between officers and enlisted members and may be charged under either UCMJ article 133 (conduct unbecoming an officer), or article 134 (the general article). *Id.* § 2-8(B).

⁷⁰ The military screens all applicants for HIV/AIDS when they enter the service. *Id.* § 2-9(A). When a military member tests positive, he or she receives a mandatory order to refrain from unsafe sexual practices that might spread the disease. *Id.* § 2-9(B). Hence, offenses are charged under Art. 90, UCMJ (disobedience to a superior’s orders). *Id.*

⁷¹ The RAND Study notes “there may be significant costs stemming from the downstream consequences of these illnesses, including increased non-mental health related medical costs, caregiver burden, strain on family relationships, domestic violence, substance abuse, crime, and homelessness.” RAND Study, *supra* note 20, at 176.

C. The Impact of PTSD on Disciplinary Offenses

In theory, a military member suffering from PTSD would find complying with the laws relating to disciplinary offenses to be extremely burdensome.⁷² PTSD's co-morbidity with agoraphobia and major depression⁷³ would lead to an increase in absence offenses.⁷⁴ The combination of major depression, increased startle response, "psychic numbing,"⁷⁵ and violent outbursts⁷⁶ would make it exponentially more difficult for the soldier to avoid (depending on his rank) disrespect offenses, disobedience offenses, conduct unbecoming an officer, or offenses under the general article.⁷⁷ Most dramatically, with a combination of "psychic numbing" (often leading to an increase in high-risk behavior), and the direct correlation between PTSD and substance abuse, one might think it virtually inevitable that a soldier suffering from PTSD would fall afoul of the fraternization, drug, and, in the worst case scenario, HIV/AIDS offenses.⁷⁸

PTSD is, in short, highly prejudicial to the maintenance of good discipline, and highly likely to increase violations of the UCMJ. To the extent that discipline requires a clear mind, predictable and reasonable response to stimuli, and freedom from the burdens of major depression and substance abuse, PTSD is discipline's mortal enemy. As the Supreme Court itself famously noted, "[A]n army is not a deliberative body. It is the executive

⁷² DSM-IV, *supra* note 8, at 424-29.

⁷³ PTSD-induced major depressive disorder is particularly troubling in the military context, for three reasons. First, roughly 15% of those with major depressive disorder will commit suicide, a rate which can only be heightened in an environment with ready access to weapons. Second, major depressive disorder is itself associated with substance-related disorders and panic disorder, both of which would be highly prejudicial to military discipline, and possibly violative of the UCMJ. And third, major depressive disorder is also associated with borderline personality disorder, itself associated with intense, uncontrollable outbursts of anger—leading inevitably to more episodes of murder, assault, and the violation of the laws of war among members of our armed forces. DSMV-IV, *supra* note 8, at 339-45 (Major Depressive Disorder); *id.* at 650-55 (Borderline Personality Disorder).

⁷⁴ UCMJ arts. 85-87.

⁷⁵ DSMV-IV, *supra* note 8, at 425.

⁷⁶ UCMJ art. 89-92 (disrespect and disobedience offenses); UCMJ art. 133 (conduct unbecoming an officer); UCMJ art. 134 (the general article).

⁷⁷ DSM-IV, *supra* note 8, at 425.

⁷⁸ UCMJ arts. 133-34 (fraternization); *id.* arts. 112(a), 133-34 (drug offenses); *id.* art. 90 (disobeying a "safe-sex" order).

arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."⁷⁹ Can an officer or a soldier suffering from severe PTSD really be expected to live up to this ideal? Unfortunately, when he does not, he becomes the target of the Military Justice System.

D. The Preferring Commander's Response to PTSD: Is There a Right Answer?

The problem PTSD poses for the preferring commander in disciplinary cases may be insoluble. The unfortunate commander faces two sets of diametrically opposed considerations. First, disciplinary action is "intended to improve, correct and instruct subordinates who depart from standards of performance, conduct, bearing and integrity, on or off duty."⁸⁰ It is rehabilitative, not punitive.⁸¹ Moreover, in deciding to offer NJP, the military commander is counseled to consider a wide range of factors such as "the nature of the offense and the circumstances surrounding its commission; [and] the member's age, rank, duty assignment, record, and experience."⁸² By logical extension, the commander must also consider these same issues in deciding whether to prefer Special or General Court Martial charges. These factors all counsel toward leniency in deciding the case of a military member suffering from PTSD. The Supreme Court itself has recognized some sort of special relationship between military commanders and their subordinates,⁸³ even though the legal effects of that relationship are extremely limited.⁸⁴ Even

⁷⁹ *Parker v. Levy*, 417 U.S. 733, 744 (1974).

⁸⁰ THE MILITARY COMMANDER AND THE LAW, *supra* note 52, at 26.

⁸¹ SCHLUETER, *supra* note 54, § 3-2; THE MILITARY COMMANDER AND THE LAW, *supra* note 52, at 92.

⁸² THE MILITARY COMMANDER AND THE LAW, *supra* note 52, at 59.

⁸³ See *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding soldiers may not sue their superiors under the Federal Tort Claims Act); *United States v. Muniz*, 374 US 150, 162 (1963) ("In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors . . .'" (internal citations omitted)).

⁸⁴ Some litigants have alleged a "quasi-parental" duty on the part of the military to its members. Courts have expressed some sympathy for this characterization, but it has not yet given rise to any liability for the military. See, e.g., *Corrigan v. United States*, 815 F.2d 954, 957-58 (4th Cir. 1987) (holding that the military could not be held liable when an under-age soldier became intoxicated and visibly inebriated at an on-base club,

without a legal obligation, the military arguably has some moral obligation in the case of PTSD: notably, by exposing the soldier to the combat that has indirectly caused his or her condition.

Second, the military, while concerned for its members, also undertakes a broader mission. As the Air Force states quite plainly, “The importance of the Air Force’s mission and inherent responsibility to the Nation requires its members to adhere to higher standards than normally found in civilian life.”⁸⁵ As detailed above, PTSD undercuts just these qualities—it can cause the sufferer to become agoraphobic, easily startled, depressed, more likely to abuse drugs and alcohol, numb to the world around him, forgetful of everyday duties, violent, and, in short, a bad soldier.⁸⁶ These disabilities will lead to increased infractions of the UCMJ, and hence will demand command attention and punishment.⁸⁷ Multiple infractions, especially those dealing with substance abuse, may ultimately lead to imprisonment (pursuant to a Court Martial), forced separation from the military, or at worst, imprisonment followed by a dishonorable discharge.⁸⁸ Given that many employment applications ask for both an applicant’s military service and criminal records, the military will have done much to burden a hypothetical soldier’s life—the precise opposite of its stated goal and “quasi-parental duty.”

So, to speak broadly, PTSD acutely raises a question common to all justice systems: is punishment ever really rehabilitation? The goal of NJP and Special Court Martial proceedings may be rehabilitation, but they also leave a black mark on the soldier’s record—in the form of an “Unfavorable Information

was allowed to drive off base, and then caused a serious traffic accident; and noting, regarding the “quasi-parental” duty, that parents and children could generally not be held liable for each others’ actions at common law).

⁸⁵ U.S. DEP’T OF AIR FORCE, REG. 36-29, MILITARY STANDARDS 1 (29 Oct. 2009).

⁸⁶ See DSMV-IV, *supra* note 8, at 425.

⁸⁷ See *supra* Part III(C).

⁸⁸ See U.S. DEP’T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN 88-91 (9 Jul. 2004) [hereinafter AFI 36-2308]. Examples where separation is deemed appropriate include “conditions that interfere with military service,” “unsatisfactory conduct,” “minor disciplinary infractions,” and “a pattern of misconduct.” Additionally, commanders MUST discharge an airman, or seek a special waiver, if the reason is a “[c]ivil court conviction for an offense for which a punitive discharge and confinement for one year or more would be authorized by the UCMJ,” or “drug abuse.” *Id.*

File” that provides commanders with “an official record of unfavorable information about an individual,” which “documents administrative, judicial, or nonjudicial censures concerning the member’s performance, responsibility, [and] behavior.”⁸⁹—that could dog that soldier for his entire time in the military, limiting his opportunities for advancement and reenlistment. And, needless to say, those same infractions that go in an “Unfavorable Information File” can also end a military career.⁹⁰ So let us put the matter starkly: should the Military Justice System attempt to deal with PTSD at all?

E. PTSD and Disciplinary Offenses: Between Rehabilitation and Punishment

The relationship between rehabilitation and punishment is one of the most complex in the philosophy of law. Nevertheless, exploring this relationship gives the contours of an answer to how the military justice system ought to treat PTSD. It explores the contours between psychiatric rehabilitation and punishment for disciplinary breaches.

In the relationship between rehabilitation and punishment, at one extreme is the position that punishment should have no rehabilitative aspect; rather punishment should primarily act as a deterrent, and should also segregate law-breakers from the rest of society. At the other extreme is the position that punishment can only be justified if it is rehabilitative. So, if a law-breaker will not repeat the malfeasance, or if punishment will not rehabilitate the lawbreaker, no punishment should be carried out. A middle ground—and the one that helps most for present purposes—is the Kantian position. To wit, punishment is rehabilitation because the lawbreaker can only rejoin the community after he has done his penance.⁹¹ To expand on Kant’s point slightly, one might say that punishment is justified not

⁸⁹ See U.S. DEP’T OF AIR FORC, INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM 4 (17 June 2005). For enlisted personnel, NJP and Court Martial convictions must be placed in the UIF.

⁹⁰ See *supra* notes 86-87 and accompanying text.

⁹¹ IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 196 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887).

only when the lawbreaker does his penance, but he can (both in the eyes of the community and in fact) rejoin the law-abiding community afterward.⁹²

When the proposition is put that way, it allows us to break down a “punishment” into two parts—that part which is punitive, and that part which is rehabilitative. This analysis lends itself to literal application in the PTSD context.⁹³ If a service member commits a disciplinary offense, and that service member has previously screened positive for PTSD, his sentence ought to combine not only the punishment the service member would normally receive, but also a mandatory course of PTSD treatment. Such a course of punishment nicely fulfills Kant’s objectives. First, the service member will do his penance, allowing the service member to re-join military society without that member being accused of escaping justice. And, second, the recommended course of punishment would also allow the service member to be literally rehabilitated. He would receive treatment to address the psychological condition from which he or

⁹² *Id.* Kant specifically spoke to the issue of medical care versus punishment, although he was referring to the criminal undergoing medical experimentation as a replacement for punishment. However, this author believes Kant’s point applies with even greater force when the alternative to punishment is rehabilitative care. Kant noted:

What, then, is to be said of such a proposal as to keep a Criminal alive who has been condemned to death, on his being given to understand that if he agreed to certain dangerous experiments being performed upon him, he would be allowed to survive if he came happily through them? It is argued that Physicians might thus obtain new information that would be of value to the Commonwealth. But a Court of Justice would repudiate with scorn any proposal of this kind if made to it by a Medical Faculty; for Justice would cease to be justice, if it were bartered away for any consideration whatever.

. . . [Public justice] is just the Principle of Equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. [And so to achieve “public justice” the criminal must be punished in the same measure as he has harmed others. Then the “scale of justice” would be re-balanced.]

Id.

⁹³ This paper will not address the far thornier issue of the balance between rehabilitation and punishment when the service member has committed a serious general court-martial crime. The issue is “thornier” because the instinct to punish, the need to segregate the perpetrator from society, and the hostility of the society to the perpetrator are all much greater than when dealing with disciplinary offenses. The author will only note Congress’s constitutional power to pass laws for the governance of military forces—and hope that the “wisdom of crowds” will prevail when Congress does the balancing.

she is suffering. Ideally, the military member could then re-enter military society, and that society would welcome him back.

IV. COMMANDERS, PSYCHOTHERAPISTS, AND COURTS-MARTIAL

Even as professional psychotherapists have taken on a role in the military that was traditionally the province of commanding officers, officers have not relinquished their traditional power and prerogatives. More specifically, they still remain intimately involved in the psychiatric care of those under them. This is particularly troubling in the case of the military justice system, where courts-martial (as opposed to the NJP used for minor offenses) supposedly protect the privilege.

The Court of Appeals for the Armed Forces has reserved the question as to whether disclosures from psychotherapists to commanding officers destroys psychotherapist-patient privilege.⁹⁴ Since psychotherapy is becoming a much more significant part of our military, these questions will only grow more important.

This section examines the existing rules and procedures relating to military psychotherapy and the military psychotherapist-patient privilege. Given the plain language of the current rules, psychotherapist-patient privilege probably has been destroyed. But that does not end the inquiry. Rather, this section goes through several arguments, both policy and legal, that the privilege ought to be preserved.

In particular, this section uncovers a little-known but very important tradition of rights-protection in the military courts. Over the years, these courts have often extended protections to military members even when civilian courts would seem to have limited those protections or taken them away. The section thus ends by arguing that, in the case of psychotherapist-patient privilege, military courts ought to act in conformity with this tradition, and preserve psychotherapist-patient privilege in the military justice system.

⁹⁴ *United States v. Jenkins*, 63 M.J. 426, 429 (C.A.A.F. 2006).

A. Why Psychotherapist-Patient Confidentiality Probably No Longer Exists in Courts-Martial

At least 30% of military members⁹⁵ in the regular course of their duties receive mental health evaluations, either at their own behest, or at the order of their commander.⁹⁶ And, given the frequency of deployments to Iraq, soon close to 100% of military members will have been screened for PTSD.⁹⁷

The question then becomes: what is the status of these evaluations at trial and during regular military operations—are they confidential and privileged or not? Because the psychotherapist-patient privilege covers only confidential communications,⁹⁸ the issues of confidentiality and privilege are inextricably intertwined, and this section will discuss them together. Additionally, discussing privilege along with confidentiality brings the latter problem into much sharper focus.

Here, the military rules, on the surface, mirror the federal ones almost entirely. However, this section will argue that DOD Directive 6490.1 and DOD Instruction 6490.4 have made it impossible for a service member to have a “confidential” mental health evaluation, and so the theoretically robust protection of psychotherapist-patient confidentiality outlined below in fact is mere words on paper. Nevertheless, that being the case, this section will conclude by arguing that profound reasons of judicial doctrine and method might allow military judges to maintain the psychotherapist-patient privilege in the military justice system.

Nevertheless, according to the Military Rules of Evidence, once the accused is subject to a court-martial under the UCMJ, he enjoys a psychotherapist-patient privilege:

⁹⁵ MHAT-III, *supra* note 18, at 7. This amount will have increased somewhat, due to the efforts to expand access to mental health treatment (and screening) outlined above. However, MHAT-IV did not provide data on the percentage of soldiers receiving care.

⁹⁶ See DEP'T OF DEFENSE., DIR. 6490.1, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES paras. 4.2.1, 4.3.5 (Oct. 1, 1997) [hereinafter DOD DIR. 6490.1].

⁹⁷ See *supra* note 32.

⁹⁸ MCM, *supra* note 5, MIL. R. EVID. 513.

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the U.C.M.J. or the M.C.A. if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.⁹⁹

As in the federal system, certain exceptions apply, only a few of which need concern us here. The psychotherapist may reveal information when he believes the patient to be a danger to any person;¹⁰⁰ "when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;"¹⁰¹ and, most importantly, "when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.M.C. [sic] 706 or Mil. Comm. R. Evid. 302." In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice."¹⁰²

The first few might apply particularly in cases of patients suffering from severe PTSD, when, as discussed above, there is a heightened tendency to violent behavior.¹⁰³ And the last would obviously come into play were the defendant to make a PTSD defense, that subject being discussed below.

In theory, then, this system provides the accused broad protection against the disclosure of psychiatric information, consistent with the protections he would enjoy in federal court. But there is one major problem. DOD Instruction 6490.4, paragraphs 6.1.3.3 and 6.1.3.5, instructs any mental healthcare provider (MHP) seeing the soldier to report the results of the mental health evaluation, whether voluntary or involuntary, to that soldier's commander.¹⁰⁴ The Instruction even informs the MHP

⁹⁹ *Id.*, MIL. R. EVID. 513(a).

¹⁰⁰ *Id.*, MIL. R. EVID. 513(d)(4).

¹⁰¹ *Id.*, MIL. R. EVID. 513(d)(6).

¹⁰² *Id.*, MIL. R. EVID. 513(d)(7).

¹⁰³ DSM-IV, *supra* note 8, 425.

¹⁰⁴ DODI 6490.4, *supra* note 44, paras. 6.1.1.3, 6.1.1.5.

explicitly to say that the session is “not confidential,”¹⁰⁵ and to instruct the service member on the “conflict of duties” the psychotherapist faces, as between a duty to the patient and a duty to the commander.¹⁰⁶ Thus it would seem that there are NO mental health evaluations that would meet the MRE 513 standard, as none would be confidential.¹⁰⁷ Language in other Department of Defense Directives and Instructions strengthens this suspicion. DOD Directive 6490.1, of which DOD Instruction 6490.4 is an implementation,¹⁰⁸ has a savings clause, which reads, “[t]he policy of making referrals for mental health evaluations . . . does not modify any authorities or responsibilities about the prevention, investigation, or prosecution of offenses under the UCMJ”¹⁰⁹ First, this language obviously makes no mention of the rights of the defendant, of confidentiality, or of evidentiary privileges. Second, and more importantly, it is arguable that the rules do not fall under the UCMJ, per se, but under the *Manual for Courts-Martial*.¹¹⁰ The UCMJ is a legislative document, created by Congress,¹¹¹ while the *Manual for Courts-Martial* is an executive document, created by executive order¹¹² (albeit pursuant to a grant of authority from Congress).¹¹³ The practical difference is that the Executive may not modify or circumvent the UCMJ—rather it is an Executive-constraining statute¹¹⁴—while he may modify the *Manual* and the Rules. Thus 6490.1’s savings clause is necessary when applied to the UCMJ, but inappropriate (indeed inexplicable) when applied to the *Manual* or the Rules.

¹⁰⁵ *Id.* para. 6.1.3.3.

¹⁰⁶ *Id.* para. 6.1.3.4.

¹⁰⁷ *Id.* paras. 6.1.3.3, 6.1.3.5.

¹⁰⁸ *See id.* at 1 (references).

¹⁰⁹ DOD DIR. 6490.1, *supra* note 95, at para. 4.9.

¹¹⁰ *See generally* MCM, *supra* note 5, part III (Military Rules of Evidence).

¹¹¹ Act of May 5, ch. 169, 64 Stat. 107-49 (1950) (current version at 10 U.S.C. §§ 801-946 (2006)).

¹¹² Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984). While this order created the modern manual, there have been procedural rules governing courts-martial as long as there have been courts-martial.

¹¹³ 10 U.S.C. § 836(a) (1998 & 2009 Supp.).

¹¹⁴ Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1198, 1224 (2007) (suggesting that the UCMJ is a statute meant to constrain the executive, rather than a general statute meant to be given specific implementation by the executive).

Hence, by the plain language of the text and the differing histories and sources of authority for the UCMJ and *Manual for Courts-Martial*,¹¹⁵ the saving clause of DOD Directive 6490.1 does not apply to the MREs, and hence not to MRE 513. As a result, DOD Instruction 6490.4 has effectively removed the psychotherapist-patient privilege from all routine mental evaluations of service members by eliminating confidentiality in mental evaluations.¹¹⁶

B. A Limited Procedural Privilege under the Manual for Courts-Martial

So it has been established that psychotherapist-patient privilege should not cover any mental health evaluations that the soldier would receive during the regular course of his duty.¹¹⁷ However, once the trial proceeding has begun some limited protections begin to apply, although they are procedural, not evidentiary.¹¹⁸ If questions of competence or capacity are raised during trial, the military judge may order the defendant to appear before a "sanity board," consisting of at least one clinical psychologist (independent of any experts the prosecution or defense may retain).¹¹⁹ Unlike the results of regular mental evaluations, if the sanity board convenes during trial, "[n]o person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any

¹¹⁵ See *supra* notes 108-09 and accompanying text.

¹¹⁶ DODI 6490.4, *supra* note 44, paras. 6.1.1.3, 6.1.1.5.

¹¹⁷ Far more protection exists for non-routine referrals and psychiatric treatment. If a service member is involuntarily admitted to a psychiatric facility, "[t]he Service member shall be evaluated by the attending privileged psychiatrist." *Id.* para. 6.2.2.3. And, if the hospitalization continues for more than twenty-four hours, paragraph 6.2.3.1 states that "[w]ithin 72 hours of admission, an independent, privileged psychiatrist, or other medical officer . . . shall review the factors that led to the involuntary admission." *Id.* para. 6.2.2.3 (emphasis added). Although the psychiatrist is to "coordinate" with the commanding officer who referred the member for involuntary hospitalization at the admissions stage, *Id.* para. 6.2.2.1, afterwards it is the job of the reviewing psychiatrist to ensure that the commanding officer did not refer the member improperly. *Id.* para. 6.2.3.6. Moreover, in these situations, MHPs do not report their findings to the member's commanding officer. Similar protections exist for military whistleblowers. See DEP'T OF DEFENSE, DIR. 7050.6, MILITARY WHISTLEBLOWER PROTECTION (23 July 2007).

¹¹⁸ See MCM, *supra* note 5, R.C.M. 706.

¹¹⁹ *Id.*, R.C.M. 706(c)(1).

statement made by the accused to the board or any evidence derived from such statement.”¹²⁰

However, even here a loophole exists, although it is only a partial one. If the issue of competency or capacity is raised while the commander is considering referring charges, or during the referral of charges,¹²¹ and the sanity board is so convened,¹²² no confidentiality protections apply to the *conclusion* of the board—everyone even conceivably involved gets a copy of the conclusion.¹²³ Yet the full findings of the sanity board may be disclosed only to the judge, defense counsel, accused, and commanding officer.¹²⁴ So even though such a report would not be confidential under the meaning of MRE 513,¹²⁵ the prosecutor could not see it because of protection under RCM 706.

C. The Twin Problems a Lack of Confidentiality Poses for Military Justice

This paper has already alluded to the first and most obvious problem a lack of confidentiality in military psychiatry poses: it throws up a barrier to effective PTSD treatment. The Iraq War Clinician Guide instructs MHP's to:

Connect with the returning veteran Practitioners should work from a patient-centered perspective, and take care to find out the current concerns of the patient (e.g. fear of returning to the war zone, concerns about having been evacuated and what this means, worries about reactions of unit, fear of career ramifications, concerns about reactions of family, concerns about returning to active duty).¹²⁶

The Department of Defense has itself established that such fears are widespread among military members,¹²⁷ although they

¹²⁰ *Id.*, R.C.M. 706(c)(5).

¹²¹ *See id.*, R.C.M. 601 (referral).

¹²² *Id.*, R.C.M. 706(b)(1)-(2).

¹²³ *Id.*, R.C.M. 706(c)(3)(A).

¹²⁴ *Id.*, R.C.M. 706(c)(3)(B).

¹²⁵ *See* DODI 6490.4, *supra* note 44, paras. 6.1.1.3, 6.1.1.5.

¹²⁶ IRAQ WAR CLINICIAN GUIDE, *supra* note 36, at 36.

¹²⁷ MHAT-I, *supra* note 3, at A-4.

may be decreasing.¹²⁸ Moreover, the Guide instructs MHPs to undertake what must be, by its very nature, a long-term, intimate course of treatment including “[e]ducation about post-traumatic stress reactions,” “[t]raining in coping skills,” “[e]xposure therapy,” “[c]ognitive restructuring,” and “[f]amily counseling.”¹²⁹ If, however, MHPs must provide reports to the soldier’s commanding officer about every therapy session,¹³⁰ then not only will the soldier’s likely fears about unit and career stigma be immeasurably strengthened,¹³¹ but effective, intimate treatment itself may become impossible. As a result, both the instances and severity of PTSD in the military will increase, leading, as discussed above, to not only more disciplinary offenses,¹³² but, quite likely, to more murders, assaults, and rapes.¹³³

The second, more acute problem (from the service member’s perspective) with the lack of confidentiality in military psychiatry emerges with respect to the latter group of charges. PTSD results not in a single instance, but in a pattern, over many years,¹³⁴ of behavior destructive to self and to others. If the military member develops a close bond, effective for treatment, with his MHP, reveals such a pattern of behavior, and that revelation is not confidential, but, indeed, reported regularly to commanding officers,¹³⁵ then nothing will stop a military prosecutor from using that information in a court-martial.

One should note that while this second problem is certainly a major problem for any military member subject to prosecution, it constitutes a far lesser problem for the military as a whole. The military operates like both a society and a business. Like any society, it needs effective mechanisms to maintain law and

¹²⁸ MHAT-III, *supra* note 8, at 7. For an argument that this improvement may be overstated, see *supra* Part II(B).

¹²⁹ IRAQ WAR CLINICIAN GUIDE, *supra* note 36, at 37-38.

¹³⁰ DODI 6490.4, *supra* note 44, paras. 6.1.3.3, 6.1.3.5.

¹³¹ MHAT-III, *supra* note 8, at 25 (“[I]ndividuals who met the criteria for acute stress symptoms, depression and anxiety reported significantly higher levels of stigma than did those who did not meet any of the criteria.”). Unsurprising, but nevertheless a problem, those who need help fear the stigma most.

¹³² See *supra* Part III(V).

¹³³ See *supra* Part IV(A).

¹³⁴ DSMV-IV, *supra* note 8, at 425; NAT’L CTR. FOR PTSD, *supra* note 16.

¹³⁵ DODI 6094.4, *supra* note 44, para. 6.1.3.5.

order, including mechanisms to prosecute, and segregate, those society members who have already, or are most likely, to harm others.¹³⁶ And like any business, it needs to manage its personnel—hence, an explicitly stated goal of military psychiatry is “managing human resources.”¹³⁷ In some ways, the Department of Defense has decided to strike a balance quite like that in *Tarasoff v. Regents of University of California*,¹³⁸ which explicitly required military psychiatrists to alert authorities of any potentially dangerous military members.¹³⁹ And, certainly, the psychiatric profession has survived that case. Yet, in other ways, the different, world-apart nature of the military increases the problem. The dissent in *Tarasoff* discussed both its desire for effective (and thus intimate) psychiatric care, and its fear that imposing a duty to warn would deter those who most needed care from seeking it.¹⁴⁰ The nature of the military environment, and the relevant policy on psychiatric care, takes these worries from the theoretical to the incarnate.

First, military members already worry more than the general population about career and personal stigma attached to mental health care.¹⁴¹ Second, the issue before us is not an occasional duty to report an especially violent patient, but the regular reporting of even the most routine psychiatric care,¹⁴² exponentially increasing the service member’s aversion to seeking care and completely destroying the psychotherapist-patient privilege in litigation.¹⁴³ Universal PTSD screening,¹⁴⁴ and the authority of commanders to order members to seek psychiatric

¹³⁶ See DOD DIR. 6490.1, *supra* note 107, para. 1.2.3 (“Requirement that commanding officers be alert to potentially dangerous Service members and take actions aimed at reducing danger to both the Service member and the general public”).

¹³⁷ See U.S. DEP’T OF AIR FORCE, INSTR. 44-109, MENTAL HEALTH, CONFIDENTIALITY, AND MILITARY LAW para 6.1 (1 Mar. 2000) [hereinafter AFI 44-109] (“Appropriate communications between MHPs and commanders aid in managing human resources . . .”); see also DOD DIR. 6490.1, *supra* note 107, para. 1.2.3.

¹³⁸ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 343 (Cal. 1976) (psychiatrist had duty to warn third party when he could confidently predict high potential of harm against her).

¹³⁹ DOD DIR. 6490.1, *supra* note 107, para 4.7.2.

¹⁴⁰ *Tarasoff*, 551 P.2d at 359 (Clarke, J., dissenting).

¹⁴¹ MHAT-I, *supra* note 3, at A-4.

¹⁴² DODI 6490.4, *supra* note 44, para 6.1.3.5.

¹⁴³ See *id.*; MCM, *supra* note 5, MIL. R. EVID. 513 (requirement of confidentiality).

¹⁴⁴ Wood, *supra* note 37.

care,¹⁴⁵ address the first of these problems to an extent. But, in this author's view, they do not solve the problem—they only make it more complex. Besides, they do nothing to address the second problem. In fact, they create it.

D. Maintaining Psychotherapist-Patient Privilege in the Military Justice System

1. A Word of Caution: Does the Real World Conform to the Theory?

It is not clear how these many rules are operating in practice. On balance, the evidence indicates that the issues outlined in Parts I and II above remain simply unresolved. The military may be the largest and most complex bureaucracy in the federal government.¹⁴⁶ And, certainly, not every Staff Judge Advocate or Military Judge will have read every DOD Directive and Instruction, of which, by this author's rough count there are over one thousand,¹⁴⁷ with new ones issued every year, not to mention the equally numerous complementary and implementing instructions in the Service branches.¹⁴⁸ Additionally, some good evidence exists that, whatever the actual legal rules may be, MRE 513 still protects psychotherapist-patient privilege in practice.

For instance, DOD Directive 6490.1 and DOD Instruction 6490.4 were both issued in 1997.¹⁴⁹ Even though Instruction

¹⁴⁵ See generally DODI 6490.4, *supra* note 44, para. 6.

¹⁴⁶ Philip Carter, *What about the Grunts?*, SLATE, Dec. 7, 2006, <http://www.slate.com/id/2155105/> (the author, a lawyer and former army officer, actually writes that the American military is "the largest and most lethargic bureaucracy in world history.").

¹⁴⁷ See Official Department of Defense Web Site for DOD Issuances, <http://www.dtic.mil/whs/directives/search.html> (last visited Feb. 8, 2010). This government site was used in obtaining many of the Department of Defense documents used in this paper.

¹⁴⁸ See, e.g., Air Force E-Publishing, <http://www.e-publishing.af.mil> (last visited Feb. 8, 2010). This site is similar to the Department of Defense Web Site for DOD Issuances, *supra* note 146, but is exclusively for Air Force documents.

¹⁴⁹ DOD DIR. 6490.1, *supra* note 107, at 1 (issued on October 1, 1997); DODI 6490.4, *supra* note 44, at 1 (issued on August 28, 1997). DOD Instruction 6490.4 is an implementing instruction of DOD Directive. 6490.1. See *supra* note 106 and accompanying text. For evidence of the density of the military bureaucracy, note that the implementing instruction was issued more than a month before the directive it was implementing.

6490.4 should have more or less eliminated psychotherapist-patient privilege for regular mental health evaluations, Air Force Instruction 44-109, *Mental Health, Confidentiality, and Military Law*, issued March 1, 2000, and which references both DOD Directive 6490.1 and DOD Instruction 6490.4,¹⁵⁰ does not treat the issue in this way. Rather, it characterizes psychotherapist-patient privilege as broad, with only limited exceptions. However, the Instruction is confusing, and requires some explication.

AFI 44-109 states that communications between a patient and a psychotherapist are generally privileged, but that “confidential communications will be disclosed to persons or agencies with a proper and legitimate need for the information and who are authorized by law or regulation to receive it.”¹⁵¹ Because of this drafting, it is not clear if these communications remain otherwise confidential despite their disclosure or if the disclosure destroys that confidentiality.

A similar problem arises when the Instruction specifically discusses the evidentiary privilege. It quotes MRE 513 verbatim,¹⁵² but then states that there is no privilege “when federal law, state law, or service regulation imposes a *duty* to report information contained in a communication.”¹⁵³ The question thus becomes, do psychotherapists have a legally cognizable “duty” to report the results of mental health evaluations to commanding officers? On the one hand, DOD Instruction 6490.4 clearly understands routine mental health evaluations as being non-confidential¹⁵⁴ and says that “the mental healthcare provider *shall* forward a memorandum to the Service member’s commanding officer.”¹⁵⁵ These clauses clearly create a duty for MHPs to report their findings to commanding officers.

On the other hand, Air Force Instruction 44-109, which is fully cognizant of DOD Instruction 6490.4 and references it

¹⁵⁰ AFI 44-109, *supra* note 136, para. 1.

¹⁵¹ *Id.* para. 2.1.

¹⁵² *Id.* para. 2.2.

¹⁵³ *Id.* para. 2.2.3 (emphasis added).

¹⁵⁴ DODI 6490.4, *supra* note 44, para. 6.1.1.3.

¹⁵⁵ *Id.* para. 6.1.3.5. (emphasis added).

multiple times,¹⁵⁶ interprets it quite differently. Regarding communications between MHPs and commanders, it states:

Appropriate communications between MHPs and commanders aid in managing human resources and can improve the therapeutic results for Service members. MHPs are encouraged to discuss the beneficial effects of commander involvement with members and, whenever possible, to obtain the member's prior consent to the communication with the commander. Some situations may, however, justify contacting the commander without the member's knowledge.¹⁵⁷

Moreover, the Instruction provides a list of situations in which the MHP is required to contact the commander,¹⁵⁸ for example when "in the MHP's opinion, the member is a danger to self or others"¹⁵⁹—thus, by negative implication, the MHP need not contact the commander in other situations. The Instruction goes on to state that, "[i]n fulfilling the requirements of paragraph 6., MHPs will provide the commander the information required for informed decision-making, but should, to the extent possible, maintain the confidentiality of communications from the patient."¹⁶⁰ The Instruction does not say whether this limited disclosure destroys legal confidentiality—i.e. the psychotherapist-patient privilege, in which case "confidentiality" would be referring to the patient's personal confidentiality—or whether legal confidentiality is maintained, despite the limited disclosure.

Nevertheless, the Air Force legal system clearly believes DOD Instruction 6490.4 makes communication between an MHP and commander optional in all but a limited class of cases,¹⁶¹ and additionally seeks to preserve patient confidentiality even in the communication with the commander.¹⁶² Thus, under the Air Force's interpretation of Instruction 6490.4, there

¹⁵⁶ See, e.g., AFI 44-109, *supra* note 136, para. 4.9.1.

¹⁵⁷ *Id.* para. 6.1.

¹⁵⁸ *Id.* para. 6.2.

¹⁵⁹ *Id.* para. 6.2.1.

¹⁶⁰ *Id.* para. 6.4.

¹⁶¹ *Id.* para. 6.2.

¹⁶² *Id.* para. 6.4.

would probably not be a legally cognizable “duty”¹⁶³ on the part of MHP’s to report the results of a mental health evaluation to a commander, and the effect of MRE 513 is preserved.

Thus, to put it politely, psychotherapist-patient privilege under military law remains “unresolved.”¹⁶⁴ Perhaps the vast bureaucracy that is the Department of Defense never meant to eliminate psychotherapist-patient privilege in the first place, so the Air Force’s interpretation¹⁶⁵ is a proper one. Perhaps, with regards to psychotherapist-patient privilege, the left hand simply did not know what the right hand was doing. Or perhaps the Air Force, seeing the danger that DOD Directive 6490.1¹⁶⁶ and DOD Instruction 6490.4¹⁶⁷ might pose to military justice, and equally aware that the Pentagon does not have time to read and monitor every service instruction, deliberately chose to embark on its own creative interpretation of the Pentagon’s rule.

2. The Textual Case for Maintaining the Privilege

The President derives authority to promulgate MREs from section 836 of the UCMJ.¹⁶⁸ The only salient restrictions on his power come from section 836(a)—military rules must mirror those in federal courts as far “as [the President] considers practicable,”¹⁶⁹—and section 836(b)—military rules must be uniform from one military court to another, “insofar as practicable.”¹⁷⁰ In construing the term “practicable” under section 836(b), the Supreme Court, in *Hamdan v. Rumsfeld*, said that the President, before departing from the uniformity requirement, must make a showing that maintaining uniformity would be impracticable.¹⁷¹ There are no Supreme Court decisions construing section

¹⁶³ *Id.* para. 2.2.3.

¹⁶⁴ Compare DODI 6490.4, *supra* note 44, para. 6, with AFI 44-109, *supra* note 136, para. 6.

¹⁶⁵ AFI 44-109, *supra* note 136, para. 6.

¹⁶⁶ DOD DIR. 6490.1, *supra* note 107, para. 4.9 (excluding the Rules of Evidence from the savings clause).

¹⁶⁷ DOD 6490.4, *supra* note 44, paras. 6.1.1.3, 6.1.1.5 (eliminating psychotherapist-patient privilege).

¹⁶⁸ 10 U.S.C. § 836 (2006).

¹⁶⁹ *Id.* § 836(a).

¹⁷⁰ *Id.* § 836(b).

¹⁷¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 622 (2006).

836(a), but if the word "practicable" is to have the same meaning in both sections of 836, then departing from the requirements of section 836(a) presumably demands a similar showing of impracticability. That showing is obviously absent regarding psychotherapist-patient privilege. That is, the MREs continue to recognize the privilege,¹⁷² even though other executive instruments seem to undermine it.¹⁷³ Almost by definition there can be no showing of impracticability if the President has not changed the MRE in the first place.

The obvious counter-argument—voiced in *Hamdan*¹⁷⁴—is that the wording of sections 836(a) and 836(b) are respectively different, the former employing the phrase "so far as [the President] considers practicable," while the latter simply says "insofar as practicable." The Supreme Court's dicta aside, this is a distinction without a difference. In either case, the President (and the executive branch more generally) promulgates the MREs and runs courts-martial. The additional phrase "as he considers" in section 836(a) does not materially change the meaning of "practicable" in both sections, since under both sections it is necessarily the President who considers, and then determines, practicability in the first instance. Moreover, in the instant case, the official "determination" of the President is found in MRE 513. At the least, before MRE 513 could be gutted, it would require the President to make a comparable "determination" (likely in the form of a new rule of evidence), which he has not done. The official "determination" in this (courts-martial) context is MRE 513, which provides the privilege.

The theoretical advantage of such a method is that it leaves both sets of rules mostly intact. Obviously, the privilege rules receive their full effect—the effect they would be given if the required disclosure rules did not exist. Moreover, even the required disclosure rules are given effect in either all or the vast majority of situations to which they apply. If the above speculation is correct—that psychotherapist-patient privilege in the

¹⁷² MCM, *supra* note 96, MIL. R. EVID. 513.

¹⁷³ See, e.g., DOD DIR. 6490.1, *supra* note 107.

¹⁷⁴ *Hamdan*, 548 U.S. at 622.

military was eliminated, in effect, “by mistake”¹⁷⁵—then the required disclosure rules were never intended to destroy psychotherapist-patient privilege in the first place. Moreover, even without this assumption, the required disclosure rules would continue to apply in all cases, in that all disclosures to commanding officers would continue to occur, fulfilling the rules’ goal of more effective personnel management. The effect of the proposed canon would be to simply eliminate one of the collateral effects of this personnel management protocol.¹⁷⁶ And, of course, in the vast majority of cases, where courts-martial are not involved, privilege issues would never arise in the first place.

Which is not to say that the proposed construction would carry the day in litigation or future rules revision. The most serious—perhaps fatal—argument against it is very simple: it goes against the plain meaning of the relevant texts. The existing privilege rule protects “confidential communications,” and communications disclosed to a third party, in this case a commanding officer, are simply not confidential. The relevant DOD instructions state as much.¹⁷⁷ Thus, under any ordinary interpretation, the communication would not be privilege in litigation.

Yet reason exists to think that military judges would not—and should not—choose such a route. First, the relationship between the relevant texts is unclear, and is itself open to multiple interpretations. If each text is read separately, and given its plain meaning, then the psychotherapist-patient privilege could be read not to survive. However, if the texts are read together, a different reading might result. If we assume, *arguendo*, that psychotherapist-patient privilege exists in the military by virtue of MRE 513, but that disclosure to commanders is required un-

¹⁷⁵ An obvious problem with the above construction is that it would not per se stop the prosecution from simply asking the accused’s commanding officer to relate the results of any psychiatric evaluation. The author, however, believes the hearsay rule would eliminate many such situations in actual litigation.

¹⁷⁶ DODI 6490.4, *supra* note 44, para. 6.1.3.3.

¹⁷⁷ Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court’s Tradition of Deference to the Military*, 1918-2004, 65 MD. L. REV. 907, 915 (2006) (describing the Court’s military jurisprudence prior to the 1950’s as the “era of noninterference”).

der DOD Directive 6490.1, then privilege must continue to exist despite disclosure. To put it another way, if the service member's therapeutic sessions are *inevitably and unavoidably* disclosed to a third-party (the commander), then one could argue that the commander also falls within the "zone of protection" of the privilege. This reading makes sense given that the basic goals of the psychotherapist and commander are the same—effective psychiatric treatment leading to improved performance and personnel management. In this way, the commander can be analogized to a specialist whom the psychotherapist consults in the course of treatment. If disclosure is part of treatment, then disclosure would not break the privilege. These reasons are rooted in the military justice system's long and proud tradition of according its people more rights than the civilians in charge see fit.

V. MILITARY JUSTICE'S NATIVE TRADITION OF RIGHTS-PROTECTION AND PSYCHOTHERAPIST-PATIENT PRIVILEGE

In recent decades military courts have developed a robust tradition of protecting the rights of service members. They have done so, at least in part, in response to developments in how the civilian courts have handled cases either arising in the military or originating in the military justice system. These shifts in the civilian justice system have led to an independent military tradition of rights protection, not tethered to developments in the civilian courts, and largely unappreciated by the wider world. Yet this under-studied tradition provides both a framework in which to analyze issues of psychotherapist-patient privilege, and a possible way to resolve the issue of the privilege's dubious existence. Which is to say, courts-martial have repeatedly stood up for the rights and privileges of military members against commanding officers and military bureaucracy. And military justice should do so here.

A. The Civilian Courts' Shifting Deference Standard Toward the Military

Over the two centuries that the Supreme Court has addressed the constitutional rights of military members, its juris-

prudence has twice shifted dramatically. This section will detail both of those shifts—the first, from general deference to the military to a far more skeptical judicial posture; and the second, away from this posture and back toward deference (although how much this second period of deference resembles the first one is open to debate). It will also point out some of the obvious deficiencies in the Court’s current jurisprudence.

Until the late 1950’s, the Court adopted a general policy of “non-interference” in military affairs.¹⁷⁸ Rather than enunciating a positive doctrine, deferential or not, by which to evaluate military claims of right, it simply refused to “interfere” in the military justice system.¹⁷⁹ Practically, this meant that then-existing military policy prevailed, and so the military won nearly all its cases.¹⁸⁰ The first shift occurred during the tenure of Chief Justice Warren, as the Court began to aggressively evaluate the jurisdiction, procedures, and rights protections of the military justice system.¹⁸¹ Indeed, during this period, the Brethren were sometimes openly skeptical—even hostile—to courts-martial. To take the most glaring example, in one case Justice Douglas opined:

[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.¹⁸²

¹⁷⁸ *Id.*

¹⁷⁹ Under Chief Justice Vinson, for instance, Prof. Lichtman’s analysis reveals that the military “won” 75.9% of the time. *Id.* at 965.

¹⁸⁰ Prof. Lichtman asserts that the proper classification of military cases is not by era, but by subject-matter. *Id.* at 910-11. John F. O’Connor disputes Prof. Lichtman’s approach, and gets the better of the argument, by pointing out that both the military’s success rate and the purported reasoning of the Court vary far more by era than by subject-matter. See John F. O’Connor, *Statistics and the Military Deference Doctrine: A Response to Prof. Lichtman*, 66 MD. L. REV. 668, 686 (2006). This debate, though interesting, is not central to this paper. Rather, for purposes of this paper, the author simply accepts Mr. O’Connor’s analysis, while making use of the raw data that Prof. Lichtman produced.

¹⁸¹ See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955).

¹⁸² *O’Callahan v. Parker*, 395 U.S. 258, 265-66 (1969).

Indeed, the Court's preference for civilian trials resulted in its dramatically limiting the jurisdiction of courts-martial, and dramatically challenging military policy, on constitutional grounds, both in and out of the courtroom.

I will give just three examples. In *United States ex rel Toth v. Quarles*, an active-duty serviceman murdered a civilian while on active duty deployment in Korea. Charges were only proffered, however, several months after the accused had been discharged from the military and returned to the United States.¹⁸³ The Court ruled that, because the accused was discharged, a court-martial did not have jurisdiction to try him¹⁸⁴—the result being that, absent an act of Congress, no court outside of Korea could prosecute the accused.

A few years later, the Court extended this line of reasoning somewhat, in *Reid v. Covert*. There the Court ruled that a court-martial did not have jurisdiction to try an Army wife who had murdered her husband while he was on active duty in the United Kingdom.¹⁸⁵ Finally, the Court extended its reasoning, from former servicemen and military spouses to military members themselves, in *O'Callahan v. Parker*. Here the Court again held that a court-martial did not have jurisdiction, this time to try an active-duty serviceman for an assault and attempted rape that he had committed in the United States, while off-base on permitted leave.¹⁸⁶ The Court reasoned that the charges against the accused lacked the requisite "service connection" to give a court-martial jurisdiction.¹⁸⁷

With such lacunae of justice obviously in mind, the Court's jurisprudence shifted again—just as seismically—starting in the mid-1970's. The Court began to routinely defer to the military in virtually every litigation before it.¹⁸⁸ In this area, however, the Court has not developed a satisfying jurisprudence. As Prof. Diane Mazur has argued, the Court's current military jurispru-

¹⁸³ *Toth*, 350 U.S. at 13.

¹⁸⁴ *Id.* at 23.

¹⁸⁵ 354 U.S. 1, 15-19 (1957).

¹⁸⁶ *O'Callahan*, 395 U.S. at 259-60.

¹⁸⁷ *Id.* at 272-73.

¹⁸⁸ See Lichtman, *supra* note 175, at 946. By Prof. Lichtman's calculation, the military, in these years, has received a favorable outcome before the Court about 85% of the time. *Id.*

dence is little more than *ipse dixit* and the repetition of “magic words” about the uniqueness and importance of the military.¹⁸⁹ The Court, while saying repeatedly that the Bill of Rights and other protections generally apply in courts-martial, has not provided any principled basis on which to withhold or extend rights to servicemen. As Justice Brennan put it in *Goldman v. Weinberger*, “If a branch of the military declares one of its rules sufficiently important to outweigh a service person’s constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.”¹⁹⁰

One does not have to agree with Justice Brennan’s judicial or political philosophy to see the unfortunate truth in his statement. *Goldman* should have been a hard case. It involved a reasonable military regulation (service members may not wear head gear that is not part of their uniforms) applied in an unreasonable fashion (only after the plaintiff had testified against the government in a court-martial).¹⁹¹ Yet, Chief Justice Rehnquist, writing for the Court, spent no more than a few sentences outlining the basis for the decision against the plaintiff (and those sentences are mostly the rote repetition of quotes from previous cases, none of which are directly on point).¹⁹² The opinion itself is quite short, and almost all of its few pages are devoted to arguing against various propositions in the dissent. As Justice O’Connor pointed out in her separate dissent, “No test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives the need for [its policy].”¹⁹³

The functional result of this combination of “because we say so” jurisprudence and deference to the military has meant that one cannot say what, if any, protections servicemen before courts-martial *are* required to have. The obvious temptation,

¹⁸⁹ See Diane H. Mazur, *Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L. J. 701, 704-05 (arguing that Justice Rehnquist’s political preference for the military gave birth to the Court’s modern military jurisprudence). See also *Goldman v. Weinberger*, 475 U.S. 503, 516 (1986) (Brennan, J., dissenting).

¹⁹⁰ *Goldman*, 475 U.S. at 515 (Brennan, J., dissenting).

¹⁹¹ *Id.* at 505 (majority opinion).

¹⁹² See *id.* at 507-08.

¹⁹³ *Id.* at 528 (O’Connor, J., dissenting).

then, would be for the military to treat servicemen as if they had no rights. Fortunately, this is not what it has done. Rather it has pushed back, extending more rights to servicemen than the civilian authorities see fit to mandate.

B. The Development of Judicial Rights-Protection in the Military

The military courts apply their own interpretations to the Supreme Court's precedents, and these interpretations have consistently extended to service members more rights than would follow naturally from the Supreme Court's language and reasoning.

I will give two examples. To begin with, in *United States v. Tempia*, the Court of Military Appeals (CMA), when faced with the question of whether military police had to give *Miranda* warnings when performing searches, answered in the affirmative.¹⁹⁴ There is nothing particularly remarkable in that result, except that it is inconsistent with the *Miranda* opinion itself, where the Supreme Court highlighted the military justice system as an example of a system that *already* gave adequate constitutional protections to defendants.¹⁹⁵ Although that portion of *Miranda* is dicta, a plain reading of that dicta and of the Court's more central observation—that the *Miranda* warnings are only one possible way to fulfill the defendant's constitutional guarantees¹⁹⁶—yields the result that military police could safely ignore *Miranda* as long as they maintained their then-existing protections. And even if military police could not “safely” ignore *Miranda*, they at least had the luxury of waiting for the Supreme Court to disqualify the more-than-plausible reading of *Miranda* mentioned above. Indeed, the dissent in *Tempia* made exactly these points.¹⁹⁷

The majority, however, disagreed. They relied on the particular facts of *Tempia* to extend *Miranda* to military defen-

¹⁹⁴ *United States v. Tempia*, 16 C.M.A. 629, 642 (1967). The CMA was re-designated the Court of Appeals for the Armed Forces (CAAF) pursuant to the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2831 (codified as amended at 10 U.S.C. § 941 (2006)).

¹⁹⁵ See *Miranda v. Arizona*, 384 U.S. 436, 489 (1966).

¹⁹⁶ *Id.* at 467.

¹⁹⁷ *Tempia*, 16 C.M.A. at 643 (Quinn, C.J., dissenting).

dants. In *Tempia*, one plausible reading of the facts was that the defendant, although apprised in a general way of his right to counsel, did not actually realize that he had a “right” that was related to other rights that would protect him during questioning, and so he both declined counsel and declined to exercise other constitutional rights.¹⁹⁸ Using these facts as a springboard, the Court of Military Appeals (CMA) extended *Miranda* warnings to all military defendants,¹⁹⁹ despite the *Miranda* Court’s positive treatment of the protections already afforded in the military justice system.²⁰⁰

Miranda, of course, is a landmark of individual-rights jurisprudence, a high water mark of sorts. Yet, in *Tempia* the CMA decided to go beyond the high water mark. The CMA mandated *Miranda* warnings, even though they certainly did not need to do so, because either *Miranda* warnings were not mandatory, or because the military justice system already fulfilled *Miranda*’s requirements.

*Middendorf v. Henry*²⁰¹ stands as a different sort of landmark than *Miranda*. *Middendorf* and several other cases from the mid-1970s signaled the second major shift in the Supreme Court’s military jurisprudence. Instead of applying the close scrutiny that had characterized its jurisprudence in the 1950s and 1960s, the Court began to apply a far more deferential standard based on the “separate” nature of military society and the importance and uniqueness of the military mission.²⁰² More specifically, the Court ruled that the accused had no right to counsel in summary court-martial proceedings.²⁰³ Three things

¹⁹⁸ *Id.* at 631-32 (majority opinion).

¹⁹⁹ *Id.* at 640 (“In sum, we are not persuaded by our [dissenting] brother’s views that we [the military] have anticipated the Supreme Court in this area We must necessarily effectuate that mandate by holding *Miranda v. Arizona* . . . applicable in military prosecutions”).

²⁰⁰ *Miranda*, 384 U.S. at 489.

²⁰¹ 425 U.S. 25 (1976).

²⁰² *Id.* at 48. Ironically, the Court, in discussing the “separateness” and “uniqueness” of the military cited *Toth v. Quarles* to justify the proposition. The irony is that the *Toth* Court was anything but deferential to courts-martial and the military, while the *Middendorf* Court based its deference, in large part, on the military’s separate and unique nature.

²⁰³ *Id.*

are remarkable about *Middendorf*, two of which are directly pertinent to this paper.

As mentioned, *Middendorf* marked the beginning of the Court's modern military jurisprudence. Other writers have already documented this sea-change.²⁰⁴ What is remarkable about *Middendorf*, for present purposes, is what the CMA did before and after the decision. In *United States v. Aldernman*, decided two years before *Middendorf*, the CMA held that the defendant *did* have a right to counsel at summary courts-martial.²⁰⁵ The *Middendorf* Court, while noting the *Alderman* decision, and recognizing that substantial deference is "normally" due to the CMA's resolution of military justice issues, held the opposite.²⁰⁶

The CMA would not be galled, however. Two years after *Middendorf*, in *United States v. Booker*,²⁰⁷ it pushed back again. Of course, the CMA could not outright overrule *Middendorf*, but the majority clearly disagreed with it. What they did instead—in obviously specious fealty to *Middendorf's* reasoning—was to sharply reduce the scope of offenses for which summary court-martial was possible.²⁰⁸ The CMA reasoned that, since *Middendorf* based its denial of the right to counsel (in part) on the summary court-martial's disciplinary nature, summary courts-martial could thenceforth only hear disciplinary offenses, and not the full range of disciplinary and minor military justice offenses they had heard to that point.²⁰⁹ The CMA put the firmest possible limit on the Supreme Court's ruling by sharply limiting the number and type of cases to which it would be applicable.²¹⁰

²⁰⁴ See, e.g., O'Connor, *supra* note 189 and accompanying text; Mazur, *supra* note 194. But see Lichtman, *supra* note 189 (arguing, in part, that the Court's military jurisprudence is better classified by subject-matter than time period).

²⁰⁵ 22 C.M.A. 298 (1973).

²⁰⁶ *Middendorf*, 425 U.S. at 43, 48.

²⁰⁷ 5 M.J. 238 (C.M.A. 1977).

²⁰⁸ *Id.* at 244.

²⁰⁹ *Id.* at 240-42. In *Middendorf*, Justice Rehnquist justified his lack of deference to the CMA, in part, on the fact that Judge Quinn had authored the opinion below, the Judge being broadly and publicly in favor of extending servicemen's rights. 425 U.S. at 44 n.20. In this context, it is surely important to note that Judge Quinn was not involved in the *Booker* decision. 5 M.J. at 238 (noting the judges who disposed of the case, none of whom was Judge Quinn).

²¹⁰ For example, the MCA repeatedly reversed itself in deciding whether or not drug use was service-connected.

C. How These Competing Tradition Apply to Psychotherapist-Patient Privilege.

The foregoing makes a rather simple point—the CMA/CAAF has often been more solicitous of service members' rights than have the civilian courts. Valid reasons exist for this discrepancy. Military courts (even those, like the CAAF, that are staffed by civilian appointees) are doubtless more sensitive to the peculiar needs of military society than their civilian counterparts. To give an obvious example, the Supreme Court's *O'Callahan* service-connection approach proved famously hard for military authorities to implement,²¹¹ while there is no indication that the military courts' rights-extending opinions have thrown up the same difficulties. Even though the Supreme Court's military deference doctrine is deeply unsatisfying, it exists for a good reason.

But, given the existence and independence of military courts, civilian jurisprudence provides not an end-point for analysis, but a starting point. In the instant case, the author hopes the military courts will continue their tradition of protecting the rights of servicemen, and save psychotherapist-patient privilege from DOD Directive 6490.1. The civilian courts certainly cannot be expected to.

CONCLUSION: THE GOALS, AND NECESSITY, OF MILITARY
PSYCHIATRY

Let us now turn from the particular to the general. First, about 17% of OIF 04-06 members currently screen positive for symptoms consistent with PTSD.²¹² Second, if history is any guide, an even larger percentage will experience PTSD in the months and years to come.²¹³ And, third, PTSD is bound to be highly prejudicial to both military discipline and military jus-

²¹¹ See *supra* note 186 and accompanying text. *Accord* *O'Callahan v. Parker*, 395 U.S. 258, 284 (1969) (Harlan, J., dissenting) ("[T]he infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue."); John F. DePue, Comment, *O'Callahan and its Progeny: A Survey of Their Impact on the Jurisdiction of Courts-Martial*, 15 VILL. L. REV. 712, 727-34 (1970).

²¹² See *supra* note 17.

²¹³ See *supra* Part I(B).

tice, in that it both makes it more difficult for a military member to operate with the sort of everyday discipline the military requires, and leads to increased likelihood of certain crimes.

Consequently, military psychiatry is not merely beneficial—it is a necessity. As the *Iraq War Clinician Guide* states, restoring an affected military member to mental health will likely take both an aggressive intervention by the psychiatrist, and an open, trusting relationship between psychiatrist and patient.²¹⁴ Yet if the psychotherapist-patient relationship is “not confidential,” and the psychotherapist must tell the patient as much,²¹⁵ then it is difficult to see how aggressive psychiatric intervention would be either successful or possible. If the doctor-patient relationship is not as successful as it could be, then one can conclude cases of PTSD will essentially go untreated, with adverse effects for both military discipline and military justice.

This paper has suggested some ways, based on both statutory construction and military precedent, that military courts might preserve the psychotherapist-patient privilege. These, of course, are not the only solutions, nor are they even necessarily the best solutions. Indeed, the best solution would probably come from re-writing the relevant DOD directives, the MREs, or both. Yet, in the short term, working through the courts probably has the advantage of speed, in that military courts deal with military justice issues every day, while the larger DOD and executive bureaucracy only deals with them sporadically. Moreover, if the courts construe the DOD directives or MREs in a way the military or executive chain of command finds unworkable or unwise, then the relevant authorities can almost certainly re-write the rules to undo the work of the courts (there not being, in the author’s estimation, any colorable constitutional issues involved).

This paper does not presume to tell the political branches exactly where or how to draw these lines. Military justice and military regulation are, after all, core areas of political branch

²¹⁴ See *supra* notes 36-43 and accompanying text. Indeed, the success of the former probably depends in large part on the existence of the latter.

²¹⁵ See *supra* notes 104-115 and accompanying text.

competence.²¹⁶ It has, however, sought to outline the necessity of military psychiatry, the problems it poses for military discipline and military justice and, finally, the more specific dangers current policy poses to psychotherapist-patient confidentiality in the military.

Still, it would be inapposite to end on so prosaic a note. Psychotherapist-patient privilege is first of all a human issue—one stemming from the very real and very horrific traumas our soldiers undergo. We must keep in mind statements like the following, from a soldier suffering from PTSD:

I didn't answer the phone, I didn't go to the door, I didn't even want to see my kids. . . . I just lay on the couch rolled up in an orange caftan. It got so bad my father started coming over every day and forcing me to get up. He would just walk me around the neighborhood to get some fresh air.²¹⁷

Similarly, Anthony Swofford's quote at this paper's opening notes the "loneliness and poverty of spirit; mental collapse; brief jovial moments after weeks of exhaustion . . . sleeplessness and drunkenness and desperation; fits of rage and despondency; mutiny of the self being told I must remember and then for many years forgetting."²¹⁸ In such statements, the person suffering emerges as a full human being—unable to escape the traumas life has inflicted upon him, rolled up in an orange caftan on the couch, in mutiny against himself. PTSD is that disorder where "the victim gropes in the dark terror of insecurity, perpetually geared up for action."²¹⁹ The disorder stalks its victim, rendering him helpless, or making him into a killer.²²⁰ Although the enemy always bears primary responsibility for creating trauma

²¹⁶ See, e.g., *Solorio v. United States*, 483 U.S. 435, 443 (1987) ("The constitutional grant of power to Congress to regulate the Armed Forces, Art. I, § 8, cl. 14, appears in the same section as do the provisions granting Congress authority, inter alia, to regulate commerce among the several States, to coin money, and to declare war. On its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section.").

²¹⁷ Scott Anderson, *Bringing It All Back Home*, N.Y. TIMES, May 28, 2006, available at <http://www.nytimes.com/2006/05/28/magazine/28vets.html>.

²¹⁸ SWOFFORD, *supra* note 1, at 3.

²¹⁹ THE ENCYCLOPEDIA OF PSYCHIATRY, PSYCHOLOGY, AND PSYCHOANALYSIS 409 (Benjamin B. Wolman ed., 1996).

²²⁰ *Id.*

in our veterans, the military sends its warriors into war zones, and then asks them to come back to civilian life and pick up where they left off.²²¹ Some cannot,²²² and some, even though suffering themselves, commit horrible, unforgivable crimes.²²³

The problem here is both wide and deep. It extends not only to horrible crimes but to disciplinary offenses, where goals of rehabilitation and punishment inextricably intertwine. And where this paper has attempted to provide a Kantian solution to the legal problem, it further extends to a problem both very significant and somewhat specific—psychotherapist-patient privilege in courts-martial. But, even in these discrete areas, the background considerations do not go away. It is not just legal rules that are on the line, but military members, their minds, and their futures. The military justice system, most of all, ought never forget this.

²²¹ As one returning veteran put it:

I mean, it's great being back with my wife, spending time with my kids, but in other ways . . . well, I guess I kind of miss it. I miss my fellow soldiers. I miss the camaraderie. And I don't mean to sound arrogant when I say this, but I miss the power. . . . And now you're back here, and you ain't king of nothing. That's very hard to explain to anyone else, but it's why I try to avoid these situations that set me off – like being in crowds or people doing stupid things on the road – because when that happens, I get hyper, and I don't like being hyper here because there's nothing I can do about it.

Anderson, *supra* note 216, at 43.

²²² *Id.*; see also MHAT-III, *supra* note 18, at 7-8 (deployments causing increased family stress).

²²³ See, e.g., *United States v. Dobson*, 63 M.J. 1 (2006) (brutal murder of husband by wife who claimed to be suffering from PTSD).

PROBLEMS AND REFORMS IN MORTGAGE-BACKED SECURITIES: HANDICAPPING THE CREDIT RATING AGENCIES

*F. Phillip Hosp**

"The credit rating agencies occupy a special place in our financial markets. Millions of investors rely on them for independent, objective assessments. The rating agencies broke this bond of trust and federal regulators ignored the warnings signs and did nothing to protect the public."¹

INTRODUCTION

Over the last four decades, credit rating agencies ("CRAs") have played a part in several major financial disasters, including the bankruptcy of Penn Central Transportation Company in 1970, the bankruptcy of Orange County in 1994, the Asian financial crisis in the late 1990's, the bankruptcy of Enron in 2001, and the bankruptcy of WorldCom in 2002.² Following each disaster, policymakers expressed outrage at the conduct of the CRAs and vowed to reform the industry. Yet, no significant reforms were ultimately implemented to prevent similar occurrences from happening in the future.

Since the current economic crisis began in 2007, economists, policymakers, and regulators have all concluded that CRAs played a large role in the collapse of the mortgage-backed

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¹ *Credit Rating Agencies and the Financial Crisis: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 1-4 (2008) [hereinafter *Credit Rating Agencies and the Financial Crisis*] (opening statement of Rep. Henry Waxman, Chairman, House Comm. on Oversight and Gov't Reform).

² JOHN C. COFFEE JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 297 (2006) [hereinafter *Coffee, Gatekeepers*].

securities market, which infected the broader economy on a global scale.³ Specifically, facts leading up to the current economic crisis have shown that market participants relied on CRAs to assess the market risks rather than conducting their own due diligence.⁴ This risk management strategy, or lack thereof, ultimately proved to be a bad decision because the credit ratings failed to accurately capture market risks and convey the changing characteristics of the mortgages underlying each security.

In the wake of the near economic melt-down, Congress and the Securities and Exchange Commission ("SEC") is discussing and proposing drastic changes to the regulatory structure that governs CRAs. This article attempts to further these discussions and proposals by proposing a handicapping system that would apply to each CRA. Similar to golf, a handicap would represent the CRA's past success or failure in rating certain types of securities. Like credit ratings themselves, the handicaps would be communicated in easy to understand alpha-numeric symbols. Above all else, these handicaps would allow market participants to compare the quality of each CRA in rating particular types of securities. By providing market participants with the means to compare each CRA, the handicaps would then in turn create large incentives for CRAs to issue accurate ratings.

This article proposes the CRA handicapping system in five sections. Section I provides a general background of CRAs and their importance to the financial markets. Section II discusses how CRAs emerged as a government-sanctioned gatekeeper for the financial system. It also describes the ratings process. Sec-

³ *Recent Events in the Credit and Mortgage Markets and Possible Implications for U.S. Consumers and the Global Economy: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 3 (2007) (testimony of Robert K. Steele, Under Secretary for Domestic Finance, United States Department of the Treasury); KENNETH G. LORE & CAMERON L. COWAN, MORTGAGE-BACKED SECURITIES § 2:12 (2008) (discussing toxicity of mortgage-backed securities).

⁴ Lloyd Blankfein, *Do Not Destroy the Essential Catalyst of Risk*, FIN. TIMES, Feb. 8, 2009, at 7. On February 8, 2009, Lloyd Blankfein, CEO of Goldman Sachs, wrote an article in the *Financial Times* where he commented on seven lessons that he learned from the current economic crisis. *Id.* Specifically, he noted that "too many financial institutions and investors simply outsourced their risk management. *Id.* Rather than undertake their own analysis, they relied on the rating agencies to do the essential work of risk analysis for them." *Id.*

tion III addresses the problems with CRA regulations leading up to the financial crisis and why those regulations have caused CRAs to fail. Section IV discusses recent regulatory reforms and SEC final rules. Finally, Section V, proposes the handicapping system and explains why it will improve the credit rating industry.

I. GENERAL BACKGROUND

Generally, companies raise capital or fund future business transactions by selling a debt instrument, which can take many forms—e.g., a note, bond, certificate, mortgage, or lease, and is usually secured by the issuer's assets.⁵ In issuing debt instruments, companies contractually agree to pay the buyer principal and interest payments in addition to any transaction-specific payments.⁶ In turn, the buyer pays the issuer an amount of money determined by the value of those periodic payments.⁷ Put simply, the buyer is paying the seller a lump sum of money now in exchange for a contractually enforceable promise to pay interest and principle payments periodically.

In regulating the sale of debt instruments, securities laws often require CRAs to verify that the seller (referred to as the "issuer") can fulfill the promised payment obligations to the buyer under the terms provided by the debt instrument.⁸ CRAs verify the issuer's ability to fulfill these terms by assessing its financial viability and the risks associated with the debt obligations.⁹ After this, the CRA issues a rating on the debt instrument. The rating comes in the form of alphabetical grade (similar to the traditional grading scale in school), which can be modified by a "+" or "-" symbol at the end. These ratings correspond to the likelihood that the issuer will default on its obliga-

⁵ WILLIAM A. KLEIN & JOHN C. COFFEE, *BUSINESS ORGANIZATION AND LEGAL FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 7-8, 251-60 (10th ed. 2007); see BLACK'S LAW DICTIONARY 433 (8th ed. 2004) (defining a "debt-instrument" as "[a] written promise to repay a debt, such as a promissory note, bill, bond, or commercial paper").

⁶ KLEIN & COFFEE, *supra* note 5, at 311.

⁷ *Id.*

⁸ See Richard E. Mendales, *The New Junkyard of Corporate Finance: The Treatment of Junk Bonds In Bankruptcy*, 69 WASH. U. L.Q. 1137, 1143-45 (1991) (discussing credit ratings issued on junk bonds).

⁹ *Id.*

tion to repay the debt.¹⁰ Ratings can also incorporate the amount of loss if a default occurs.¹¹

In the United States, the two largest rating agencies are Moody's and Standard and Poor's ("S&P").¹² As Chart 1.1 illustrates, "Aaa" and "AAA" are the best ratings issued by Moody's and S&P respectively. In being the best, these ratings communicate to potential investors that an issuer has the lowest risk of default (i.e., the highest probability of repaying debt obligation).

The current regulatory structure groups credit ratings into two levels of quality: investment grade and speculative grade (commonly referred to as "junk").¹³ Generally, investment grade bonds are rated BBB or higher and are considered by the rating agency as likely to meet payment and performance obligations.¹⁴ On the other hand, junk bonds typically have a rating lower than BBB and a higher risk of default.¹⁵ These bonds usually pay higher yields than investment quality bonds to compensate investors for this increased risk of default or increased amount of financial loss if a default occurs.¹⁶

¹⁰ COFFEE, GATEKEEPERS, *supra* note 2, 284.

¹¹ *Id.*

¹² See Claire A. Hill, *Regulating the Rating Agencies*, 82 WASH. U. L.Q. 43, 46-50 (2004) (discussing the history of the rating agencies).

¹³ *Id.* at 48.

¹⁴ *Id.*; Kenneth G. Lore & Cameron L. Cowan, MORTGAGE-BACKED SECURITIES: DEVELOPMENTS AND TRENDS IN THE SECONDARY MARKET, § 9:1 (2008).

¹⁵ Hill, *supra* note 12, at 48.

¹⁶ *Id.* at 67.

CHART 1.1¹⁷

<u>Moody's</u>	<u>S&P</u>	<u>Grade</u>	<u>Risk</u>
Aaa	AAA	Investment	Lowest
Aa	AA	Investment	Low
A	A	Investment	Low
Baa	BBB	Investment	Medium
Ba, B	BB, B	Junk	High
C	D	Junk	In default

II. CREDIT RATING AGENCIES AS GATEKEEPERS

CRA's are important players in the financial market because they belong to group of professions know as "gatekeepers" who are charged with the mission of keeping market risks in check. There are several types of gatekeepers to include auditors, CRA's, securities analysts, and attorneys, to name a few.¹⁸ Together, these professions are tasked with the ultimate mission of protecting market transparency and informational integrity.¹⁹ They do this by performing different services including verifying a company's financial statements (auditor), evaluating the creditworthiness of a security or a company (CRA), assessing a company's potential investments (securities analyst), and

¹⁷ Amy K. Rhodes, *The Role of the SEC in the Regulation of the Rating Agencies: Well-Placed Reliance or Free-Market Interference?* 20 SETON HALL LEGIS. J. 293, 303 n.41 (1996).

¹⁸ See COFFEE, GATEKEEPERS, *supra* note 2 (discussing the role of gatekeepers in financial markets); Frank Partnoy, *How and Why Credit Rating Agencies Are Not Like Other Gatekeepers*, in FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? 59 (Yasuyuki Fuchita & Robert E. Litan eds., 2006) [hereinafter Partnoy, *Not Like Other Gatekeepers*].

¹⁹ Partnoy, *Not Like Other Gatekeepers*, *supra* note 18.

assessing the legality of a corporation's business decisions (attorney).²⁰

Gatekeepers are critical to the financial markets. By ensuring that accurate information is disclosed to investors and the government, gatekeepers maintain an efficient market, which incorporates information into the price or demand of a traded security.²¹ This theoretically blocks bad actors and bad deals from exploiting the financial markets, and it also helps market participants make the best business decisions.

A. Case Study: *Lehman Brothers Inc.*

The collapse of Lehman Brothers is a good example of why gatekeepers are also essential for corporate executives in running their companies. Dale George, a former Washington Mutual senior risk manager, correctly described the gatekeepers' role in business by comparing them to brakes that prevent the car from going over a cliff.²² Lehman Brothers is an example of a company that went "over a cliff" after its executives ignored warnings communicated to them by the company's own analysts.

Lehman Brothers began 2008 as the fourth-largest U.S. investment bank, and was considered by some to be one of the most prestigious and well-respected financial institutions on Wall Street. On September 15, 2008, the company filed for Chapter 11 bankruptcy protection—the largest filing of its kind in U.S. history—shocking most people in the financial industry.²³ The shockwave of Lehman's failure was felt far beyond the

²⁰ *Id.*; see also Christopher Cox, Chairman, Sec. & Exch. Comm'n, Address to the 2007 Corporate Counsel Institute (March 8, 2007) (discussing the lawyer in the role of a gatekeeper), available at <http://sec.gov/news/speech/2007/spch030807cc.htm>.

²¹ STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 33 (2d ed. 2008).

²² Pierre Thomas & Lauren Pearle, *Exclusive: WaMu Insiders Claim Execs Ignored Warnings, Encouraged Reckless Lending*, ABC NEWS ONLINE, Oct. 13, 2008, available at <http://www.abcnews.go.com/TheLaw/Story?id=6021608&page=3>.

²³ Steve Fishman, *Burning Down His House*, N.Y. MAG., Dec. 8, 2008, at 28; Susanne Craig, *AIG, Lehman Shock Hits the World Markets*, WALL ST. J., Sept. 16, 2008, at A1 (discussing the size of Lehman's bankruptcy).

company and its shareholders as its ripple effects spread panic throughout the entire U.S. economy.²⁴

After Lehman's failure, many financial experts started to question the viability of other financial major leaguers like Morgan Stanley and Merrill Lynch. This caused sources of commercial paper to disappear and costs of borrowing to skyrocket.²⁵ Eventually, the entire financial system became paralyzed after banks stopped lending money due to concerns about their capital reserves.²⁶

After the collateral damage of Lehman's bankruptcy became apparent, the Congressional House Committee on Oversight and Government Reform summoned Richard Fuld, Lehman's CEO, to testify in what was the first of many hearings intended to identify the problems that affected the financial system.²⁷ In the hearing, the Committee ultimately determined that, in Lehman's case, executives pursued a business strategy that relied too much on leverage, despite prior warnings from company insiders.²⁸

In his own defense, Mr. Fuld claimed that the company was brought down by events outside his control.²⁹ He cited various factors like short selling and mark-to-market accounting rules.³⁰ While these things might have contributed to Lehman's troubles, the Committee dismissed these explanations. In doing so, the Committee highlighted several internal documents from Lehman's employees acting in gatekeeper capacities who

²⁴ The *New York Times* dubbed September 15, 2008 as "one of the most dramatic days in Wall Street's history. . . ." Andrew Ross Sorkin, *Bids to Halt Financial Crisis Reshape Landscape of Wall Street*, N.Y. TIMES, Sept. 15, 2008, at A1.

²⁵ See *The Causes and Effects of the Lehman Brothers Bankruptcy: Hearing Before the Comm. on Oversight and Gov't Reform*, 110th Cong. 1 (2008) (opening statement of Rep. Henry Waxman, Chairman, House Comm. on Oversight and Gov't Reform), available at http://oversight.house.gov/images/stories/Hearings/110th_Congress/Lehman_Hearings_Statement_HAW_10.6.08.pdf. Chairman Waxman noted that Lehman's bankruptcy caused a snowball effect throughout the financial markets. *Id.* After its filing, investors worried about the stability of the financial markets causing them to invest in Treasury Bills. *Id.* In turn, banks became worried about liquidity and started to hoard cash. In all, these events caused the credit markets to freeze. *Id.*

²⁶ *Id.* at 3.

²⁷ *Id.*

²⁸ *Id.* at 4.

²⁹ *Id.* at 3.

³⁰ *Id.*

warned management about the company's over-leveraged position.³¹ The Committee also highlighted Lehman documents revealing that company executives "saw warning signs" but "did not move early/fast enough."³²

In the end, the events occurring before Lehman's demise demonstrate why gatekeepers are an important check and balance on a corporation's business decisions. If gatekeeper warnings are repeatedly ignored, significant consequences are likely to result that can affect the financial strength of the company or, in Lehman's case, the entire American financial system.

B. Incentives for Gatekeepers

So besides the example of Lehman Brothers, why should executives heed warnings from its own gatekeepers? Moreover, why should policymakers and participants in the financial market trust gatekeepers to regulate the market?

Generally, gatekeepers are reliable for two reasons. First, gatekeepers often have reputational incentives to act as a neutral party in reporting or certifying investment information.³³ Second, some gatekeepers have an obligation, via governmental regulations or corporate governance procedures, to verify the validity of corporate disclosures and investments, or the legality of a corporation's business decisions.³⁴

1. Reputational Gatekeeper

A reputational gatekeeper is "a repeat player who has over time developed 'reputational capital'³⁵ by verifying only [infor-

³¹ *Id.* at 4, 7.

³² *Id.* at 5.

³³ *Id.*

³⁴ See, e.g., Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L. Q. 619, 623 (1999) [hereinafter Partnoy, *The Siskel and Ebert of Financial Markets*] (discussing regulations that require credit ratings).

³⁵ Reputational capital is the quantitative measure of an entity's reputation for integrity and fairness within a particular financial community. KEVIN T. JACKSON, BUILDING REPUTATIONAL CAPITAL: STRATEGIES FOR INTEGRITY AND FAIR PLAY THAT IMPROVE THE BOTTOM LINE 63-76 (2004).

mation] that the gatekeeper believes [to be] accurate.”³⁶ After a reputational gatekeeper establishes credibility within the financial community, its opinion on a financial representation, whether it is the value of an investment or the stability of a company, makes the information in that financial representation more believable.³⁷ In other words, because the gatekeeper pledged its reputation in verifying the information, people are more willing to rely on that information in making important business decisions.

As shown below, because current regulations require that market participants use CRAs, reputational capital has become almost irrelevant for CRAs to make a profit. However, in the late nineteenth century—before these regulations existed—this was not the case. In those days, CRAs relied on their reputations as credible purveyors of business information to sell their rating publications to business people. These publications consisted of the agencies’ opinions on the creditworthiness of different businesses or types of debt.³⁸ Because CRAs initially relied on subscription fees paid by investors, their profitability and success relied on their reputation as non-biased conveyers of accurate information.³⁹

The demand for this information started after the collapse of the financial sector in 1837 when many banks stopped lending money to businesses.⁴⁰ Although there are a variety of explanations for this lending freeze, the primary reason behind this is that banks lacked information to determine whether a particular business could repay a debt during those tough financial times.⁴¹ In recognizing a need for this information, a silk merchant named Lewis Tappan decided to sell his detailed

³⁶ Merritt B. Fox, *Gatekeeper Failures: Why Important, What To Do*, 106 MICH. L. REV. 1089, 1091 (2008) (summarizing Professor Coffee’s reputational gatekeeper argument).

³⁷ *Id.*

³⁸ Richard Cantor & Frank Packer, *The Credit Rating Industry*, 19 FED. RES. BANK OF N.Y. Q. 1 (1994).

³⁹ Partnoy, *The Siskel and Ebert of Financial Markets*, *supra* note 34, at 640 (“During this time, ratings were financed entirely by subscription fees paid by investors, and the rating agencies competed to acquire their respective reputations for independence, integrity, and reliability.”).

⁴⁰ *Id.* at 636 n.71.

⁴¹ *Id.*

business records to other business people. These records contained information detailing the creditworthiness of his clients.⁴² In 1841, Tappan expanded this idea by creating the Mercantile Agency, which became the first companies to provide a venue for merchants to exchange reports on the standing of their clients.⁴³

Starting in 1890 Henry Poor and John Moody followed Tappan's lead by establishing Poor's Publishing Company and Moody's Rating Agency, respectively. By 1916, both of these companies developed simple rating methodologies (shown in Chart 1.1) used to rate stocks and corporate debt.⁴⁴ Businesses and investors relied heavily on this information to decide what company deserved their money.⁴⁵

2. Regulatory Gatekeeper

A regulatory gatekeeper is an entity whose verification services are mandated by government rules and regulations.⁴⁶ Regulatory gatekeepers have an incentive to act honestly in their gatekeeper capacity because the government generally imposes heavy sanctions on them, including removing licenses conveying gatekeeper status, for failing to properly conduct themselves. For example, when the accounting firm of Arthur Andersen fraudulently handled the audit of Enron, the government took legal action against Arthur Andersen, ultimately leading to the destruction of the company and effectively putting it out of business.⁴⁷

In addition to being reputational gatekeepers, CRAs act as regulatory gatekeepers.⁴⁸ In this capacity, CRAs directly affect the buying and selling of mortgage-backed securities. For some

⁴² *Id.* at 636.

⁴³ *Id.* at 637.

⁴⁴ *Id.* at 638-39.

⁴⁵ *See id.* at 640 (describing CRAs in the 1920s and 1930s).

⁴⁶ *See id.* at 681-83 (describing regulations that incorporate CRAs into the U.S. financial system).

⁴⁷ *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

⁴⁸ Professor Partnoy notes that CRAs have been incorporated into over 100 regulatory decisions, releases, and rules since 1973. Partnoy, *The Siskel and Ebert of Financial Markets*, *supra* note 34, at 690.

types of investors, CRA ratings restrict the kinds of investments they can buy. For example, the government mandates that institutional investors like pension funds, money market funds, insurance companies, and banks hold only securities that are rated investment grade.⁴⁹ This is an important role for CRAs because institutional investors constitute the majority of the investors who buy mortgage-backed securities.⁵⁰

CRA ratings also directly affect the sale of mortgage-backed securities. For example, in some instances, the Securities Act of 1933 requires an issuer to register a mortgage-backed security with the SEC before it can sell the security in the U.S.⁵¹ The purpose of this registration process is to supply investors with important information concerning the securities being offered.⁵² This protects them from misrepresentations and other fraudulent conduct in the sale of a security. For the most part, the registration process requires a significant amount of time and effort on behalf of the issuer because the SEC must review the registration statement that the issuer is required to file.⁵³ However, an issuer can avoid waiting for the SEC to review and comment on the registration statement if the issuer offers the mortgage-backed securities "off the shelf."⁵⁴ Under this exception, regulations permit the issuer to register the investment-

⁴⁹ See *id.* at 667 n.230 (discussing limits imposed on an institutional investor in buying or holding non-investment grade securities).

⁵⁰ Aaron Unterman, *Exporting Risk: Global Implications of the Securitization of U.S. Housing Debt*, 4 HASTINGS BUS. L.J. 77, 90-92 (2008) (CRAs are essential to "monitor[ing] and evaluat[ing] the performance and value of these securities."); see COFFEE, GATEKEEPERS, *supra* note 2, at 290 (discussing the different industries that utilize CRAs); Partnoy, *The Siskel and Ebert of Financial Markets*, *supra* note 34, at 691; Edward F. Green & Linda C. Quinn, *Building on International Convergence of the Global Markets: A Model for Securities Law Reform*, 1281 PLI/Corp 11 at 7 (2001).

⁵¹ Securities Act of 1933, ch. 38, title I, §1, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §77e (2006)); Unterman, *supra* note 50, at 92 (stating that disclosure requirements do not apply to securities being bought by institutional investors because they have the capability to protect themselves by employing analysts).

⁵² Douglas J. Dorsch, *The National Securities Market Improvement Act: How Improved is the Securities Market?*, 36 DUQ. L. REV. 365, 367 (1998).

⁵³ See Adoption of Integrated Disclosure System, Securities Act Release No. 6383, Exchange Act Release No. 18,524, Investment Company Act Release No. 12,264, 47 Fed. Reg. 11,380 (Mar. 16, 1982).

⁵⁴ See 17 C.F.R. § 229.1101 (2005).

grade rated securities prior to planning any specific offering.⁵⁵ Consequently, in obtaining the appropriate credit rating, the issuer can offer its securities without waiting for further action by the SEC and save substantial time and effort in selling the security.⁵⁶

C. Credit Ratings in Mortgage Securitization

Now that this article has provided examples of the ways that CRAs affect the buying and selling of mortgage-backed securities, it is necessary to explain the securitization process and how CRAs rate a security.

1. What Is Mortgage Securitization

Mortgage securitization is the process by which mortgage loans are pooled together and sold to investors.⁵⁷ This process allows banks and other lending institutions that originate loans (originators) to transfer the loans off their balance sheet while in some cases maintaining the right to service those loans.⁵⁸ By transferring the loans off their balance sheet, originators increase their capital reserve ratio. This allows them to issue more loans to other homebuyers, which generate more income via origination fees.

Generally, individual loans are not attractive to investors wanting a steady income because the investor is twice removed (sometimes more) from the homeowner and does not know firsthand the actual risk of default, which depends heavily on the underwriting standards and practices of the originator. To ad-

⁵⁵ See Security Ratings, Securities Act Release No. 8940, Exchange Act Release No. 58,071, 73 Fed. Reg. 40,106 (proposed July 11, 2008). See generally CHOI & PRITCHARD, *supra* note 21, at 459-60 (discussing the SEC review process of initial public offerings).

⁵⁶ Security Ratings, 73 Fed. Reg. 40,106.

⁵⁷ Richard J. Rosen, The Role of Securitization in Mortgage Lending, (Fed. Res. Bank of Chi., Chi. Fed. Letter No. 244, 2004), http://www.chicagofed.org/digital_assets/publications/chicago_fed_letter/2007/cfnovember2007_244.pdf.

⁵⁸ Servicing rights can also be sold to other entities that are unrelated to the transaction. See David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U. L. REV. 985, 994 (2006).

dress the unattractiveness of individual home loans, securitization seeks to reduce the risk of default by pooling a large number of mortgages together into one investment. When more loans are pooled together, the effect of one loan's default is less because there are more assets to make up for the losses incurred from the default.

2. The Securitization Process and the Role of CRAs

The securitization process starts when an originator agrees to loan money to homebuyers in return for interest and principle payments.⁵⁹ The originator sells the right to these payments to an arranger who groups the loans into pools.⁶⁰ The arranger sells the loans to a special purpose vehicle (SPV), which is a separate legal entity that cuts off the arranger's vulnerability to losses incurred from the loan pool.⁶¹ The SPV finances the cost of purchasing the loan pool by issuing shares of the pool to investors.⁶² This affords the SPV the right to manage the collateral and collect the interest and principal payments.⁶³

Once the SPV acquires the loan pool, it rearranges and structures loans into different sub-parts called tranches.⁶⁴ Each tranche represents mortgages with similar characteristics to meet the requirements of different investors. For example, institutional investors demand less risky investments. Therefore, an

⁵⁹ INT'L ORG. OF SEC. COMM'NS, THE ROLE OF CREDIT RATING AGENCIES IN STRUCTURED FINANCE MARKETS 7 (2008) [hereinafter IOSC], <http://www.cmvm.pt/NR/rdonlyres/85312A11-A927-4F63-810A-082C1A2CF5F8/9759/RelIOSCOsobrePapelCRAMercProdEstrut.pdf>.

⁶⁰ See, e.g., *In re Worldcom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 652 (S.D.N.Y. 2004) (discussing the role of Bank of America as a lead arranger and its due diligence requirements). See also John Patrick Hunt, *Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, 2009 COLUM. BUS. L. REV. 109, 136 (noting the dominance of a few major banks that act as arrangers); SEC, SUMMARY REPORT OF ISSUES IDENTIFIED IN THE COMMISSION STAFF'S EXAMINATIONS OF SELECT CREDIT RATING AGENCIES 6 (2008) [hereinafter SEC SUMMARY REPORT], www.sec.gov/news/studies/2008/craexamination070808.pdf.

⁶¹ Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2045-46 (2007) (discussing how SPVs protect assets from creditors).

⁶² SEC SUMMARY REPORT, *supra* note 60, at 6.

⁶³ IOSC, *supra* note 599, at 7.

⁶⁴ *Id.* at 4.

SPV might structure the underlying loans into tranches representing similar risk categories. In doing so, the SPV will consolidate loans with similar characteristics, e.g., maturity dates, prepayment risks, and interest payments.⁶⁵

In the case of risk-based tranches, the tranches with the least risk are called senior tranches.⁶⁶ Tranches with the most amount of risk are referred to as junior tranches.⁶⁷ Senior tranches are less risky than junior tranches because SPVs structure the security so that junior tranches incur losses before senior tranches.⁶⁸

In addition to having loans with low risk exposure, senior tranches will often include some form of credit enhancement. Credit enhancements can be internal contractual rights with respect to other tranches in the loan pool, or external arrangements with third parties that protect investors against financial losses. The most common forms of internal credit enhancements are (1) subordination—where junior tranches incur losses before the senior tranches, (2) over-collateralization—where the SPV creates an equity tranche that absorbs losses before the investor tranches, and (3) excess spread—where the SPV creates loss reserves or pays off delinquent payments with interest payments that exceed the payments owed to investors.⁶⁹

The most common form of external credit enhancement is the credit default swap. Effectively, a credit default swap is an insurance policy requiring the seller of the swap (i.e., the insurer) to reimburse the buyer (i.e., the insured) if any specific

⁶⁵ SEC, Proposed Rules for Nationally Recognized Statistical Rating Organizations, Release No. 34-57967, File No. S7-13-08, at 36215 (June 25, 2008) [hereinafter SEC's Proposed Rules for NRSROs], <http://www.sec.gov/rules/proposed/2008/34-57967fr.pdf>.

⁶⁶ Wong, *Emerging and Nonstandard Products: A Rating Agency's Perspective*, 759 PLI/COMM. 347, 350 (1997).

⁶⁷ PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, POLICY STATEMENT ON FINANCIAL MARKET DEVELOPMENTS 8 (Mar. 2008) [hereinafter PRESIDENT'S WORKING GROUP] ("The subprime RMBS and the ABS CDOs were structured in tranches and a very large share of the total value of the securities issued was rated AA or AAA by the credit rating agencies."), http://www.ustreas.gov/press/releases/reports/pwgpolicys-tatemktturmoil_03122008.pdf.

⁶⁸ *Id.*

⁶⁹ SEC SUMMARY REPORT, *supra* note 60, at 6.

credit event occurs.⁷⁰ Under this agreement, the SPV pays the third party to cover potential losses to investors of a particular tranche.⁷¹ Coverage under the credit default swap agreement is usually triggered by specified credit events. These events are usually defined as a percentage of homeowners defaulting on their mortgage payments owed to that tranche.⁷²

In 2008, credit default swaps became increasingly controversial as companies that were heavily involved with credit default swaps were unable to fulfill their requirements as a result of a bankruptcy filing or large financial losses. One of these companies was Lehman Brothers, one of the ten largest sellers of credit default swaps, which was unable to fulfill its contractual obligations to investors after filing for bankruptcy.⁷³ Consequently, investments that were covered by swaps from defunct companies such as Lehman Brothers became exposed to unexpected financial risks, which added to the snowball effect that destroyed investor confidence in the mortgage-backed securities market.⁷⁴

After structuring the loan pool into tranches, the SPV hires a CRA to rate each tranche.⁷⁵ In doing so, the CRA essentially forecasts the likelihood that the tranche will meet its payment and performance obligations. In other words, the CRA forecasts

⁷⁰ Unterman, *supra* note 50, at 89 (discussing general concepts of derivatives). Credit default swaps are very similar to insurance policies in their payment structure. For example, at the end of February 2007, the cost of \$10 million of insurance on a AAA-rated tranche was \$68,000 plus \$9,000 in annual premiums. Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, WALL ST. J., Apr. 6, 2009, at A15.

⁷¹ Unterman, *supra* note 50 at 89.

⁷² *Id.*

⁷³ Julie Satow, *Derivatives Pose New Wrinkle in Lehman Case*, N.Y. SUN, Sept. 25, 2008, at B1.

⁷⁴ Institutional investors such as banks and insurance companies became increasingly concerned about the downward spiral of mortgage-backed securities because, aside from the potential loss in value, these institutions would be required to maintain more capital if their securities' ratings fall. See Leslie Scism & Randall Smith, *Wall Street Wizardry Reworks Mortgages—Repackaged Investments Are Good for Bankers and Ratings Firms, but the Regulators Scoff*, WALL ST. J., Oct. 1, 2009, C1 (discussing the measures employed by investment bankers to deal with falling credit ratings).

⁷⁵ CRAs charge issuers a fee based on a determined percentage of the total value of the rated security. SEC SUMMARY REPORT, *supra* note 60, at 7; IOSC, *supra* note 5959, at 6.

whether the cash flow will experience any unexpected interruptions before it reaches the investor.⁷⁶

3. The Ratings Process

The ratings process can be divided into four steps.⁷⁷ In step one, the issuer sends data on both itself and the security to the rating agency.⁷⁸ The issuer data includes information on its background, strategy, operations systems, historical performance data, etc.⁷⁹ The security data includes information on the loans held by the SPV including the principal amount; geographic location of the property; credit history of the borrower; ratio of the loan amount to the value of the property and the type of loan, e.g., first lien, second lien, primary residence, or secondary residence; the proposed capital structure of the SPV; and the proposed level of credit protection for each tranche.⁸⁰

In step two, the CRA analyst assesses the potential future performance of the loan pool.⁸¹ These predictions are based on a stress test which uses both the issuer and security data.⁸² With this information, the analyst simulates the loans' performance under various possible scenarios which differ in degrees severity.⁸³ The purpose of this initial stress test is to determine the amount of risk at each tranche level.⁸⁴ The rating agency determines these risks based on the number of loans in each tranche that default in this test scenario.⁸⁵ For example, if the loan pool in a senior tranche defaults more than is acceptable for a certain credit rating, then the analyst will go back to the

⁷⁶ SEC SUMMARY REPORT, *supra* note 60, at 7; IOSC, *supra* note 59, at 6.

⁷⁷ Claire A. Hill, *Securitization: A Low-Cost Sweetener for Lemons*, 74 WASH. U. L.Q. 1061, 1070 (1996).

⁷⁸ SEC SUMMARY REPORT, *supra* note 60, at 7; IOSC, *supra* note 59, at 6.

⁷⁹ Reiss, *supra* note 58, at 1014.

⁸⁰ IOSC, *supra* note 59, at 6.

⁸¹ SEC SUMMARY REPORT, *supra* note 60, at 7; IOSC, *supra* note 59, at 6.

⁸² *Id.* ("This analysis also includes assumptions as to how much principal would be recovered after a defaulted loan is foreclosed."); *see also* Wong, *supra* note 66, at 351.

⁸³ IOSC, *supra* note 59, at 6.

⁸⁴ *Id.*

⁸⁵ *Id.*; *see also* Wong, *supra* note 66, at 351.

issuer and require that it provide more credit enhancement so that the senior tranche can be rated accordingly.⁸⁶

In step three, the analyst evaluates both quantitative and qualitative aspects of the tranche.⁸⁷ In the qualitative analysis, the CRA analyst checks the security's proposed capital structure to determine whether it satisfies the CRA's rating requirements.⁸⁸ This includes accounting for the security's payment priorities to determine the tranche's relative seniority, and the trigger events for any credit enhancements. In the quantitative analysis, the CRA analyst reviews the security's cash flow and whether it is sufficient to satisfy investors' performance expectations and pay all the necessary fees.⁸⁹

CRA's also consider operation/administrative risks and legal risks when issuing a credit rating. One factor under the operational/administrative risks is servicer. When evaluating the servicer, the CRA analyst considers whether the servicer will be capable of adequately servicing the loan pool.⁹⁰ When evaluating the legal risks associated with a security, the analysis will consider several factors such as the jurisdictional effects of bankruptcy, the regulatory issues of the issuer/industry, the legal structure of the sale, the requirements necessary for a perfection of security interests, and the tax implications.⁹¹

Lastly, in step four, the analyst develops a rating recommendation for each tranche and presents it to a rating committee.⁹² The rating committee is usually comprised of junior and

⁸⁶ IOSC, *supra* note 59, at 7. Many commentators have noted that the CRA's provide too much guidance in recommending remedial actions for the issuers to take. *See Id.*

⁸⁷ Reiss, *supra* note 58, at 1014 (describing four steps in the analyses); *Cf.* SEC SUMMARY REPORT, *supra* note 60, at 7-8 (only describing three types of analyses).

⁸⁸ SEC SUMMARY REPORT, *supra* note 60, at 7-8.

⁸⁹ As Professor Reiss notes, "[the] primary concern here is the risk profile of the originator." Reiss, *supra* note 58, at 1014 (citing SECURITIZATION: ASSET-BACKED AND MORTGAGE-BACKED SECURITIES § 9.04, at 9-21 (Ronald S. Borod ed., 2003)).

⁹⁰ *Id.* at 1014-15.

⁹¹ In Professor Reiss's article, he discusses the effect that anti-predatory lending laws in Georgia, New Jersey, and North Carolina have on the legal risks associated with mortgage-backed securities. Specifically, he argues that because these states passed laws making investors liable for lending law violations, mortgages from those states were not sold on the secondary market because CRA's would not assign them a favorable rating. *Id.*

⁹² SEC SUMMARY REPORT, *supra* note 60, at 9; *see also* IOSC, *supra* note 59, at 7-10.

senior level analysts.⁹³ After the analyst's presentation, the committee votes on each tranche and notifies the issuer of its decision to assign each tranche a particular rating.⁹⁴

After the initial rating is issued and the securities are sold, CRAs monitor each security and general market conditions. If the CRA discovers that new information could have a "material impact on a security's creditworthiness," it reconvenes the rating committee and reconsiders the rating.⁹⁵

In all, the credit rating process demonstrates that CRAs are crucial to managing the risks of mortgage-backed securities for two reasons. First, CRAs are the last party to scrutinize the investment before the issuer sells it to investors. This gives them the power to demand necessary information concerning the viability of the assets underlying the security. Second, CRAs have no long-term financial interest in the profitability of the security. This enables them to be objective in assessing the security's risk.

III. PROBLEMS IN THE CREDIT RATING INDUSTRY

Although the credit rating process appears to be a legitimate way to assess the risks of the mortgage-backed securities, recent revelations have demonstrated that credit ratings are ineffective at best and dangerous at worst.⁹⁶ CRA critics claim that problems within the credit rating industry have negatively affected the reliability of the credit ratings.⁹⁷ In this, they rightfully argue that the "issuer pays" fee structure creates perverse incentives for CRAs to overstate their ratings or dilute rating

⁹³ SEC SUMMARY REPORT, *supra* note 60, at 9; *see also* IOSC, *supra* note 59, at 7-10.

⁹⁴ SEC SUMMARY REPORT, *supra* note 60, at 9; *see also* IOSC, *supra* note 59, at 7-10.

⁹⁵ Gretchen Morgenson, *Debt Watchdogs: Tamed or Caught Napping?*, N.Y. TIMES, Dec. 7, 2008, at A1.

⁹⁶ *See* James J. Cramer, *The Great Shakeout; Good-bye, Masters of the Universe. Hello, Ron Hermance of Paramus, New Jersey*, N.Y. MAG., Sept. 29, 2008, at 26. ("[R]atings agencies, like Standard & Poor's and Moody's, blew the call. Failing to take the new risky lending practices into account, they just assumed that as long as employment held up . . . the mortgage-backed bonds were good.").

⁹⁷ Michael Lewis and David Einhorn, Op-Ed, *The End of the Financial World as We Know It*, N.Y. TIMES, Jan. 4, 2009, at WK9.

requirements.⁹⁸ These critics also argue that the regulations governing the credit rating industry fail to inject free market forces that create proper incentives for CRAs to accurately rate each security.⁹⁹

A. SEC Examination of the Credit Rating Agencies

Problems within the credit rating industry became apparent after a recent government investigation. In 2007, the SEC launched an examination of Standard and Poor's, Moody's, and Fitch after foreclosure and delinquency rates began to skyrocket, and the CRAs began to precipitously downgrade their ratings on mortgage-backed securities and collateralized debt obligations.¹⁰⁰ During this examination, the SEC reviewed rating policies, procedures, and practices to "develop an understanding of the practices of the rating agencies surrounding the rating of [residential mortgage-backed securities] and [collateralized debt obligations]."¹⁰¹

On July 8, 2008, the SEC issued a report detailing its findings. These findings showed that CRAs focused on maximizing their profits rather than maintaining the integrity of the ratings process. In doing so, the CRAs knowingly used antiquated and faulty models to rate mortgage-backed securities.¹⁰² Additionally, the findings showed that CRAs failed to update initial ratings to reflect subsequent changes in a security's risk caused by

⁹⁸ In 2007, New York Attorney General, Andrew Cuomo, addressed this problem when he signed an agreement with the big-three CRAs that requires up-front fees ratings to be published. See Andrew Cuomo, N.Y. State Att'y Gen., Attorney General Cuomo Announces Agreement with Three Lenders (June 5, 2007), *available at* http://www.oag.state.ny.us/media_center/2008/jun/june5a_08.html. See also Lawrence J. White, *The Credit Rating Industry: An Industrial Organization Analysis*, in RATINGS, RATING AGENCIES AND THE GLOBAL FINANCIAL SYSTEM 43 (R.M. Levich, G. Majnoni, & C.M. Reinhart, eds. 2002) [hereinafter White, *The Credit Rating Industry*]; Hill, *Regulating the Rating Agencies*, *supra* note 12, at 50; Rhodes, *supra* note 17, at 308-09.

⁹⁹ See SEC SUMMARY REPORT, *supra* note 60, at 6 (recommending against punitive action in the "Remedial Action" sections of the report).

¹⁰⁰ SEC SUMMARY REPORT, *supra* note 60 at 1-2.

¹⁰¹ *Id.* at 1.

¹⁰² Congressman Waxman noted that, "[The] total revenues for the three firms doubled from \$3 billion in 2002 to over \$6 billion in 2007. At Moody's, profits quadrupled between 2000 and 2007. In fact, Moody's had the highest profit margin of any company in the S&P 500 for five years in row." Credit Rating Agencies and the Financial Crisis, *supra* note 1, at 1; SEC SUMMARY REPORT, *supra* note 60.

new economic conditions in the securities market.¹⁰³ Overall, these problems created an environment where CRAs routinely issued ratings that communicated false risk assessments to investors.

In reaching its findings, the SEC reviewed “internal records, including written policies, procedures and other such documents related to initial ratings, [and] the ongoing surveillance of ratings.”¹⁰⁴ Among other demonstrative evidence found during the investigation, one email sent by a CRA analyst to a colleague sums up the lack of diligence on the part of the CRAs. In the email, the analyst states that her firm’s model did not “capture half of the [deal’s] risk,” but that “it could be structured by cows and we would rate it.”¹⁰⁵

Likewise, other emails demonstrate that CRA analysts knew the effect of their actions on the market. However, their ultimate concern was clear as one CRA staffer stated, “Let’s hope we are all wealthy and retired by the time this house of cards falters.”¹⁰⁶ When combined with other evidence uncovered during the investigation, these emails not only demonstrate that the CRA analysts knowingly used faulty models to rate securities, it also shows that the CRAs accepted their models’ ineffectiveness and had no desire to improve the quality of rating methodologies.

So why did CRAs fail in assessing the risks of mortgage-backed securities? As an initial matter, comments in the SEC’s report state that the current fee structure, in which the issuer pays for the rating, creates a conflict of interest between the CRAs’ desire to obtain issuer business and the CRAs’ ability to issue objective ratings.¹⁰⁷ This is supported by other internal documents uncovered by the SEC. For example, in an email entitled “Competition with Moody’s,” two S&P officers expressed

¹⁰³ SEC SUMMARY REPORT, *supra* note 60, at 10-12; Unterman, *supra* note 50, at 94-95 (noting that sub-prime loans infiltrated the mortgage-backed securities market in 2004 & 2005 as lenders reduced their standards to issue more loans).

¹⁰⁴ SEC SUMMARY REPORT, *supra* note 60, at 3-4.

¹⁰⁵ Credit Rating Agencies and the Financial Crisis, *supra* note 1 (Instant Message Conversation between Shannon Mooney and Ralul Dilip Shah, Apr. 5, 2007); *see also* SEC SUMMARY REPORT, *supra* note 60, at 12 & n.8.

¹⁰⁶ SEC SUMMARY REPORT, *supra* note 60, at 12 n.8.

¹⁰⁷ *Id.* at 23.

frustration in losing a deal to Moody's.¹⁰⁸ Supposedly, the issuer decided to hire Moody's to rate the securities because S&P required more credit enhancements. After losing the deal, S&P did not stand firm on its overall risk analysis. Instead, the two officers discussed the possibility of diluting S&P's rating requirements to make sure future deals were not lost.¹⁰⁹

Findings in the investigation also suggest that financial information on issued securities and CRA rating methodologies are too opaque; in that the information available does not allow investors to conduct their own due diligence on the quality of the issued security or the rating.¹¹⁰ In fact, even the raters have trouble gaining access to the necessary loan data to calculate a rating. Such difficulty is demonstrated in an email sent by an S&P analyst to a senior manager in which the analyst requests loan documentation to review risks of a security being rated. In response to this request, the senior manager stated, "Any request for loan level tapes is **TOTALLY UNREASONABLE!!!** Most investors don't have it and can't provide it. Nevertheless we **MUST** produce a credit estimate."¹¹¹

Indeed, it is maddening that analysts and other employees at the rating agencies knew of the problems and failed to disclose them. However, what is even more maddening is that the SEC knew of the problems in early 2007 and decided not to investigate the CRAs until later that year. In March 2007, Christopher Cox, Chairman of the SEC, gave a speech to the Corporate Counsel Institute where he said, "[b]ecause [CRAs] relied on others to verify the quality of the assets underlying the structured products they rated, it is very likely those ratings were often based on incorrect information."¹¹² However, despite this

¹⁰⁸ Credit Rating Agencies and the Financial Crisis, *supra* note 1 (E-mail from Yo-Tsung Chang to Joanne Rose, et al., May 25, 2004).

¹⁰⁹ *Id.*

¹¹⁰ See Hunt, *supra* note 60, at 126-27 (defining transparency as "investors' ability to understand how agencies arrive at ratings and their ability to monitor how ratings perform").

¹¹¹ Credit Rating Agencies and the Financial Crisis, *supra* note 1 (E-mail from Frank Raiter to Richard Gugliada et al., March 20, 2001).

¹¹² Christopher Cox, Chairman, Sec. & Exch. Comm'n, SEC Speech: Statement at Open Meeting on Rules for Credit Agencies (June 11, 2008), *available at* <http://www.sec.gov/news/speech/2008/spch061108cc.htm>.

statement, the SEC did not start examining the Big Three until about October 2007.¹¹³ This shows that, in addition to the Big Three, the SEC was also complicit in the lack of oversight on the mortgage-backed securities market.

In any event, the problems within the credit rating industry are a result of ineffective government regulations that fail to inject incentives into the credit rating business that are necessary to protect the integrity of the rating system. In failing to do so, the current regulatory structure has all but endorsed the reckless conduct of the CRAs in issuing faulty ratings over the past couple decades.

B. Conflicts of Interest

Most CRAs have an issuer paid fee structure, according to which issuers pay CRAs to rate their financial products. Unlike the alternative business models such as the subscription model, the issuer pays model creates a conflict of interest between the CRAs' desire to obtain issuer business and the CRAs' ability to render objective ratings. These conflicts are particularly troublesome with mortgage-backed securities because a small number of arrangers control about eighty percent of the mortgage-backed securities market.¹¹⁴ Furthermore, these mortgage-backed securities deals bring in more fees than other financial products, like traditional corporate bonds, because the deals are complex.¹¹⁵ Consequently, these select few arrangers have substantial influence on the CRAs ability to rate mortgage-backed securities and generate more profits for the CRA.

Internal documents uncovered by the SEC during their 2008 investigation have demonstrated the negative effects that these conflicts of interest can have on the quality of ratings. For example, in an email uncovered by the SEC entitled "Competition with Moody's," two S&P officers discussed their mutual

¹¹³ SEC SUMMARY REPORT, *supra* note 60, at 2 (noting that the final report was the product of a 10-month investigation).

¹¹⁴ According to sample deals in its 2008 Report, the SEC noted that twelve arrangers control eighty percent of the mortgage-backed securities deals in total dollars. *Id.* at 32.

¹¹⁵ COFFEE, GATEKEEPERS, *supra* note 2, at 296-97 (noting that the rating fees are typically higher for asset securitizations).

frustration over losing a deal to rival Moody's.¹¹⁶ In doing so, these two S&P officers suggested that in the future it might be beneficial for them to dilute S&P's rating requirements, which would facilitate the issuance and encourage issuers to hire S&P to rate future financial products.

C. Lack of Regulatory Incentive

Despite the obvious conflicts of interest presented by the issuer pays business model, such problems could be mitigated if government regulations made the cost of issuing inaccurate ratings greater than any benefits gained from diluting rating standards. However, regulations currently require financial institutions to utilize CRAs to access the financial markets. This provides little incentive for CRAs to protect their reputational capital.

For example, in November of 2008, the United States Federal Reserve created a government program named "Term Asset-Backed Securities Loan Facility" ("TALF"). The purpose of the program was to strengthen the United States economy by supporting the issuance of loans collateralized by asset-backed securities, which "historically have funded a substantial share of consumer credit and SBA-guaranteed small business loans."¹¹⁷ Under TALF, the Federal Reserve agreed to lend money to holders of asset-backed securities only if the securities held a AAA-rating (or its equivalent). Without a rating of AAA, holders of ABS were ineligible for the program. This is one of many examples where the government has implemented financial regulations requiring market participants to obtain a credit rating. In requiring market participants to buy credit ratings via regulations like TALF, the government has essentially cemented the demand for credit ratings. This guaranteed client base acts as a professional safety net of sorts for CRAs because as long as market participants are engaging in certain transac-

¹¹⁶ Credit Rating Agencies and the Financial Crisis, *supra* note 1 (Email from Yotsung Chang to Joanne Rose, et al., May 25, 2004).

¹¹⁷ Press Release, Federal Reserve Board, Federal Reserve Announces the Creation of the Term Asset-Backed Securities Loan Facility (TALF) (Nov. 25, 2008) *available at* <http://www.federalreserve.gov/newsevents/press/monetary/20081125a.htm>.

tions, they will pay for a credit rating no matter how reliable the rating is.

Regulations requiring the use of CRAs also create perverse incentives for market participants to pay for higher ratings even if those ratings are based on inaccurate data. Like TALF, regulations requiring market participants to obtain a particular credit rating confer non-informational benefits upon those market participants like the ability to sell your asset-backed securities to TALF. In the aggregate, these regulations have made inaccurate ratings valuable for market participants on all sides of the transaction. Market participants on the sell-side will pay ratings fees regardless of the accuracy because inflated ratings reduce their funding costs and buyers only distinguish between the rating issued, not the CRA issuing the credit ratings.¹¹⁸ And, without a rating, regulations that require institutional investors to buy investment-grade securities will prevent sell-side participants from selling their securities to that type of buyer.

Like their counterparts, market participants on the buy-side also lack sufficient incentives that would inject any meaningful economic value in the accuracy of a rating. Instinctively, one would think that buyers would be the party most concerned with the ratings accuracy. However, as the financial crisis has shown, buyers in a market bubble environment, like the housing bubble, often lack a natural aversion to risk, which causes them to disregard the importance of their due diligence efforts and the due diligence efforts of CRAs. Furthermore, institutional buyers benefit from artificially inflated ratings because those ratings allow them to buy riskier investments that have more earning potential than properly rated investment-grade securities. An artificially high rating not only provides these investors with access to these investments, but they also provide shelter to corporate officers from external and internal criticism when those investments fail.¹¹⁹

¹¹⁸ SEC Roundtable to Examine Oversight of Credit Reporting Agencies 17 (Apr. 15, 2009), *available at* <http://www.sec.gov/spotlight/cra-oversight-roundtable/cra-oversight-roundtable-transcript.txt>.

¹¹⁹ Professor Partnoy has written extensively on the non-information benefits of credit ratings. In his writings, he uses the term “regulatory license” when referring to the non-informational benefits provided by financial regulations. In advancing his “regu-

Despite government mandated ratings, the credit rating industry lacks adequate incentives because the SEC has demonstrated little backbone in deterring CRAs from issuing inaccurate ratings. For instance, after its 2007 investigation, the SEC failed to recommend any punitive action against the CRAs involved. Instead, the SEC only recommended remedial measures, which the CRAs agreed to before the investigation's findings were published.¹²⁰ Nevertheless, even if the SEC wanted to penalize inept CRAs, it would be difficult to do so because Moody's, S&P, and Fitch dominate the ratings business. In fact, in 2007, those three CRAs, (i.e., the Big Three) rated ninety-nine percent of the asset-backed securities issued in the United States.¹²¹ This market dominance has stifled competitive and regulatory pressures in the industry, which in turn has caused CRAs to become complacent in not updating and improving their rating methodologies.

D. Oligopolistic Market

The dominance of the Big Three is a direct result of the Nationally Recognized Statistical Rating Organization ("NRSRO") designation, which the SEC required for ratings to be used for

latory license" theory, Professor Partnoy contends that market participants buy credit ratings because (1) investments with a good rating attract more potential buyers than non-rated securities; (2) receiving a good rating saves issuers costs associated with regulatory burdens or prohibitions associated with non-rated investment grade securities; and (3) good credit ratings often provide corporate leaders, such as portfolio managers, with legal protection in case their investors claim that they breached their fiduciary duty in buying or holding the security. See Partnoy, *The Siskel and Ebert of Financial Markets*, *supra* note 34, at 681-90.

¹²⁰ *Id.*; see also Lawrence J. White, Comments on References to Ratings of Nationally Recognized Statistical Rating Organizations (Sept. 5, 2008), SEC File No. S7-17-08 available at <http://www.sec.gov/comments/s7-17-08/s71708-6.htm> ("[L]oosening the deadlock grip that a specific, handful of ratings firms (the firms that the SEC has designated as NRSROs) have had on the quality assessments of securities that the SECs regulated financial institutions have been required to make [will take the bond rating industry in a sensible direction]. In making those quality assessments (usually with respect to the safety and/or liquidity of the debt securities that were in their portfolios), the regulated financial institutions have been required to use exclusively the NRSROs ratings of those securities.").

¹²¹ SEC, *Annual Report on Nationally Recognized Statistical Rating Organizations*, 35 (2008), <http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0608.pdf> [hereinafter 2008 SEC NRSRO Annual Report].

any regulatory purpose.¹²² The SEC created this designation in 1975 to prevent a “race to the bottom” mentality and to prevent any “fly-by-night” agencies attempting to take advantage of the regulatory structure’s reliance on credit ratings.¹²³ Ultimately, the NRSRO designation accomplished this goal in preventing such non-NRSRO designated CRAs from entering the market. However, the designation also disproportionately blocked legitimate new entrants from issuing regulatory ratings.¹²⁴

In addition to the CRA designation, the SEC also raised the barriers to entry by adopting absurd qualification standards. To qualify as an NRSRO, a rating agency had to be “nationally recognized” and “widely accepted in the United States.”¹²⁵ While this standard presented no problem to the already established players, it prevented any new CRA, without institutional history similar to the Big Three’s, from entering the ratings business.¹²⁶ Some argue that non-NRSRO designated CRAs could become “nationally recognized” by rating securities for non-regulatory purposes. This argument is impractical because these non-designated CRAs lack the requisite information to properly rate the securities. Furthermore, in practice, non-designated CRAs cannot make money by forecasting the potential of an investment to default because market participants

¹²² Professor Coffee suggests that “[t]he most telling evidence that the extremely concentrated character of the credit-rating market in the United States is not the product of a natural monopoly is the existence, outside the United States, of as many as 130 to 150 rating agencies.” COFFEE, *GATEKEEPERS*, *supra* note 2, at 292.

¹²³ By referring to the “race to the bottom” mentality, Professor Coffee means competitive forces causing rating agencies to dilute their standards to get business. *Id.* at 289.

¹²⁴ As of December 28, 2009, the SEC designated a total of ten rating agencies as NRSROs: (1) A.M. Best Company, Inc.; (2) DBRS Ltd.; (3) Egan-Jones Rating Company; (4) Fitch, Inc.; (5) Japan Credit Rating Agency, Ltd.; (6) LACE Financial Corp.; (7) Moody’s Investors Service, Inc.; (8) Rating and Investment Information, Inc.; (9) Realpoint LLC; and (10) S&P Ratings Services. See SEC, *Spotlight on: Nationally Recognized Statistical Rating Organizations*, available at <http://www.sec.gov/divisions/marketreg/ratingagency.htm> (last visited Dec. 28, 2009).

¹²⁵ Isaac C. Hunt, Jr., Comm’r, U.S. Sec. Exch. Comm’n, *Testimony Concerning the Role of Credit Rating Agencies in the U.S. Securities Markets* (Before the Senate Committee on Governmental Affairs) (Mar. 20, 2002) available at <http://www.sec.gov/news/testimony/032002tsih.htm>.

¹²⁶ See, e.g., Comments of the United States Department of Justice in the Matter of: File No. S7-33-97 Proposed Amendments to Rule 15c3-1 under the Securities Exchange Act of 1934 (Mar. 6, 1998).

have no reason to pay them. Consequently, the majority of non-designated CRAs make money by informing market participants of the valuation process instead of predicting default.¹²⁷

CRAs have vigorously defended the accuracy of their ratings by claiming that they accurately capture risk over time when compared to public information.¹²⁸ However, this argument is unpersuasive because CRAs have manipulated their ratings in the past to account for faulty risk assessments.¹²⁹ Commentators note that CRAs primarily distort their track record by impulsively downgrading the debt of a company days before the company files for chapter eleven protection.¹³⁰ For example, in the case of Enron, Moody's and S&P rated Enron's debt investment grade until four days before Enron declared bankruptcy even though the company's financial situation was clear for many months.¹³¹ As commentators note, this made it possible for the rating agencies to claim that their ratings accurately reflected Enron's risk at the time the company filed for bankruptcy.¹³²

Moreover, in today's markets, CRAs have better access to more information than regular investors.¹³³ Years ago this was not the case because CRAs rated securities by reviewing corporate disclosures an average investor could find in regulatory databases. Today, however, the market includes complex and confusing investment vehicles like mortgage-backed securities and credit derivatives whose structure many investors do not understand.¹³⁴ Regardless, even if an investor understands these investments, mortgage-backed securities do not provide sufficient data about the risk associated with the underlying

¹²⁷ COFFEE, GATEKEEPERS, *supra* note 2, at 292.

¹²⁸ See *id.* at 297 (detailing the credit rating industry's response to accusations that ratings are inaccurate); see also Gregory Husisian, *What Standard of Care Should Govern the World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability* 75 CORNELL L. REV. 411, 440-42 (1990) (discussing the accuracy of bond ratings).

¹²⁹ COFFEE, GATEKEEPERS, *supra* note 2, at 60-70.

¹³⁰ *Id.*

¹³¹ See John Coffee, *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1409-16 (2002).

¹³² COFFEE, GATEKEEPERS, *supra* note 2, at 285-86.

¹³³ PRESIDENT'S WORKING GROUP, *supra* note 67, at 8.

¹³⁴ SEC SUMMARY REPORT, *supra* note 60, at 1; Unterman, *supra* note 50, at 92.

investments.¹³⁵ The only market participants that receive this information are the CRAs, which receive it during the ratings process. Consequently, investors are forced to rely on an investment's rating to determine its risk.¹³⁶

Nevertheless, it is apparent that the CRAs' arguments have had little effect on the overall perception of CRAs within the financial industry.¹³⁷ In 2004, the Association for Financial Professionals conducted a study that polled financial professionals who regularly rely on credit ratings in their day-to-day business.¹³⁸ Generally, the survey concluded that these financial professionals believe that the SEC—or another regulatory body—should be more proactive in overseeing the CRAs. More specifically, only fifty-three percent of them found credit ratings to be accurate in conveying useful information for the purposes of risk management.¹³⁹ This unflattering perception has undoubtedly worsened since the financial crisis hit.¹⁴⁰

¹³⁵ Unterman, *supra* note 50, at 92.

¹³⁶ PRESIDENT'S WORKING GROUP, *supra* note 67, at 8 ("Many . . . global investors . . . relied heavily on the ratings in making investment decisions or in communicating risk appetites to their investment managers, rather than undertaking their own independent credit analysis on instruments that often were quite complex.").

¹³⁷ Partnoy, *The Siskel and Ebert of Financial Markets*, *supra* note 34, at 681-90; *but cf.* Liz Rappaport & Serena Ng, *Credit Ratings Now Optional, Firms Find*, WALL ST. J., Oct. 29, 2009, at C1 (noting that prominent companies are selling bonds or structuring complex securities without credit ratings, which was "inconceivable" in the past).

¹³⁸ Ass'n for Fin. Prof'ls, *2004 Credit Rating Agency Survey*, 7 (2004), www.afponline.org/pub/pdf/2004_10_research_cra_report.pdf.

¹³⁹ *Id.* at 3. Journalists have also written about the credibility to which professionals in the financial industry view credit ratings. For example, Michael Lewis and David Einhorn wrote an article for the *New York Times* in which they detailed the validity of credit ratings on MBIA, Inc., a company that provides financial guarantee insurance and fixed-income management. In their article, Lewis and Einhorn illustrate how the credit ratings assigned to MBIA failed to address the hazardous debt that the company incurred. Their article also noted that private companies like Gotham Partners—a hedge fund—recognized the hazardous nature of MBIA's portfolio and that the CRAs failed to downgrade MBIA. *See* Lewis and Einhorn, *supra* note 97.

¹⁴⁰ *See, e.g.,* Joe Bel Bruno, *Barclays' Diamond Lashes Out At Credit Rating Agencies*, WALL ST. J. (online edition), Dec. 14, 2009, *available at* <http://online.wsj.com/article/BT-CO-20091214-708015.html> (reporting that Barclays PLC President Robert Diamond stated "[i]f anyone bases a decision on risk on a rating agency, they're fired").

IV. RECENT REGULATION

To address the problems with credit ratings, Congress passed the Credit Rating Agency Reform Act of 2006 ("Rating Agency Act").¹⁴¹ In passing the Rating Agency Act, Congress sought to increase competition within the industry, establish clear registration procedures for NRSROs, and define crucial terms such as "credit rating agency,"¹⁴² "credit rating,"¹⁴³ and "NRSRO."¹⁴⁴ Congress also sought to improve transparency in the ratings industry by imposing substantive requirements on NRSROs concerning the use and misuse of nonpublic information and conflicts of interest.¹⁴⁵

In addition to its recommended reforms, the Rating Agency Act mandated that the SEC propose new rules and recommendations to curb abusive practices by the CRAs.¹⁴⁶ Accordingly, on June 16, 2008 and July 11, 2008, the SEC proposed new rules and rule amendments for NRSROs that were designed to address the opaqueness of CRA rating procedures and methodologies, to reduce undue reliance on credit ratings in the SEC's regulations and forms, and to reduce conflicts of interest in the rating industry.¹⁴⁷ During 2008-09, the SEC aggressively adopted versions these proposals.

¹⁴¹ Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327 (2006). The SEC has known about the problems of the credit rating industry since at least the early 1990's when it solicited and subsequently received comments for reforming the CRAs. However, until recently, the SEC has not taken any major steps toward reforming the credit rating industry until the Rating Agency Act. *See* Rating Agencies and the Use of Credit Ratings Under the Federal Securities Laws, Securities Act Release No. 8236, Exchange Act Release No. 47,972, 68 Fed. Reg. 35,258 (June 12, 2003) (discussing previous actions taken by the SEC).

¹⁴² 15 U.S.C. § 78c(a)(61).

¹⁴³ *Id.* § 78c(a)(60).

¹⁴⁴ *Id.* § 78c(a)(62). *See also* S. REP. NO. 109-326, at 2 (2006).

¹⁴⁵ Credit Rating Agency Reform Act § 4.

¹⁴⁶ Credit Rating Agency Reform Act §§ 6-7.

¹⁴⁷ Proposed Rules for NRSROs, *supra* note 65, § II. *See also* References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 58070, 73 Fed. Reg. 40,088 (proposed July 11, 2008); Securities Ratings, Securities Act Release No. 8940, Exchange Act Release No. 58,071, 73 Fed. Reg. 40,106 (proposed July 11, 2008); References to Ratings of Nationally Recognized Statistical Rating Organizations, Investment Company Act Release No. 28,327, 73 Fed. Reg. 40,124 (proposed July 11, 2008).

A. SEC Final Rules: February 2, 2009

On February 2, 2009, the SEC published the text of new rules it adopted on December 3, 2008.¹⁴⁸ The SEC adopted these rules and rule amendments ("February Final Rules") "to increase the transparency of the NRSROs' rating methodologies, strengthen the NRSROs' disclosure of ratings performance, prohibit the NRSROs from engaging in certain practices that create conflicts of interest, and enhance the NRSROs' recordkeeping and reporting obligations to assist the Commission in performing its regulatory and oversight functions."¹⁴⁹

1. Amendments to Form NRSRO

To improve the NRSRO application process, the February Final Rules modified Exhibits 1 and 2, which CRAs are required to submit to the SEC with their application.¹⁵⁰ Exhibit 1 requires CRAs to submit performance statistics that allow the SEC to measure the accuracy of the CRA's rating.¹⁵¹ The February Final Rules amended Exhibit 1 by enhancing the statistics that CRAs are required to submit. In doing so, the February Final Rules require that CRAs disclose transition statistics for each asset class of credit rating for which an NRSRO is registered with the SEC or is seeking registration, broken out over one, three, and ten year periods. In addition, the February Final Rules require CRAs to disclose all rating transitions, including upgrades and downgrades, as well as default statistics, in each case relative to the initial rating.

¹⁴⁸ See Amendments to Rules for Nationally Recognized Statistical Rating Organizations Release No. 34-59342; File No. S7-13-08, dated Feb. 2, 2009 [hereinafter February 2009 Final Rules], <http://www.sec.gov/rules/final/2009/34-59342fr.pdf>.

¹⁴⁹ *Id.* at 6456; see also Press Release, U.S. Sec. & Exch. Comm'n, SEC Approves Measures to Strengthen Oversight of Credit Rating Agencies (Dec. 3, 2008) (on file with author), available at <http://www.sec.gov/news/press/2008/2008-284.htm>.

¹⁵⁰ February Final Rules, *supra* note 148, at 6457-59 (introducing the amendments to Exhibits 1 & 2). CRAs apply for NRSRO status using Form NRSRO. 17 C.F.R. § 249b.300 (2009).

¹⁵¹ See § 249b.300 (requiring Exhibit 1). Exhibit 1 elicits the information required by Section 15E(a)(1)(B)(i) of the Exchange Act. February 2009 Final Rules, *supra* note 148, at 6457.

Exhibit 2 requires CRAs to disclose information pertaining to their rating procedures and methodologies.¹⁵² The February Final Rules enhanced these disclosure requirements by requiring CRAs to disclose the following information: (1) how much verification was performed on assets underlying the security; (2) how much verification was referenced by the structured finance transaction and is relied on in determining credit ratings; (3) how assessments of the quality of originators play a part in the credit ratings; and (4) the surveillance process used by the NRSRO, including whether different models or criteria are used for surveillance than are used for determining initial ratings.

2. Amendments to Rule 17g-2 – Records Retained

The February Final Rules also amended Rule 17g-2, which governs the records CRAs are required to keep and how long those records must be retained.¹⁵³ The February Final Rules changed Rule 17g-2 by adding three new record keeping requirements and enhancing an existing requirement for the purpose of allowing “[m]arket participants and observers [to] be able to compare the ratings of the NRSROs hired by the arrangers against the ratings of NRSROs and others not hired by the arrangers.”¹⁵⁴

The first new recordkeeping requirement added to Rule 17g-2 is paragraph (a)(8).¹⁵⁵ Paragraph (a)(8) requires NRSOs to make and retain records that reflect the complete history of each outstanding rating. This allows market participants and regulators to decipher the meaning for any fluctuation in an

¹⁵² See § 249b.300 (requiring Exhibit 2). Exhibit 2 elicits the information required by Section 15E(a)(1)(B)(ii) of the Exchange Act. February 2009 Final Rules, *supra* note 148, at 6459.

¹⁵³ *Id.* at 6460; see 17 C.F.R. § 240.17g-2 (2009).

¹⁵⁴ SEC’s Proposed Rules for NRSROs, *supra* note 65, at 36221; see also White, *supra* note 120 (“With greater choice as to where they seek information, the financial markets can impose market discipline, based on which rating firms (or other types of information-provision firms) have been the most reliable, which have had the best “track records” in predicting defaults, which have had the least conflict-of-interest problems, which have revealed the most information (e.g., about their methodologies and procedures) that the markets consider important, etc. Competition will work, if given a chance. New ratings forms, procedures, and participants may well emerge. Innovation will have an open field.”).

¹⁵⁵ February 2009 Final Rules, *supra* note 148, at 6460.

individual rating. To accomplish that, NRSROs are required to keep records for initial ratings, upgrades, downgrades, placements on watch lists for upgrade or downgrade, and withdrawals.

The second new recordkeeping requirement added to Rule 17g-2 is paragraph (a)(2)(iii).¹⁵⁶ This paragraph requires NRSROs that rate structured finance products—i.e., mortgage-backed securities—to document the rationale for any material difference between the credit rating implied by quantitative models used in the ratings process and the final credit rating issued if the quantitative model is a substantial component in the process of determining a structured finance product's rating. The purpose of this amendment is to enable the SEC and internal auditors to "understand the methodologies through which analysts developed the credit rating issued by the NRSRO." However, in assessing their obligations under this amendment, NRSROs are responsible for making the determination of what constitutes a "substantial component" and what is deemed "material."¹⁵⁷

The third and final recordkeeping requirement added to Rule 17g-2 is paragraph (b)(8). Paragraph (b)(8) requires NRSROs to maintain any written communication relating to complaints about the performance of a credit analyst in determining, maintaining, monitoring, changing, or withdrawing a credit rating and the NRSRO that relates to complaints by third parties.

The February Final Rules also amended Rule 17g-2 by enhancing paragraphs (b)(7) and (d). The February Final Rules amended paragraph (b)(7), which initially required NRSROs to maintain all internal and external communications that pertain to "initiating, determining, maintaining, changing, or withdrawing a credit rating," to include the term "monitoring." Accordingly, NRSROs are now required to retain all communications relating to the monitoring of ratings. The February Final Rules amended paragraph (d) by requiring NRSROs to make publicly available a random sample of 10% of their ratings and their his-

¹⁵⁶ *Id.* at 6482.

¹⁵⁷ *Id.*

tories documented for each class, provided that the NRSRO has issued 500 or more ratings in that class.¹⁵⁸

3. Amendments to Rule 17g-3 – Annual Reports

The February Final Rules also modified Rule 17g-3, which requires an NRSRO to submit several annual reports including audited financial statements, unaudited financial statements of parent corporations, an unaudited report concerning revenue categories of the NRSRO, a report detailing the compensation of credit analysts, and an unaudited report of the NRSRO's largest customers.¹⁵⁹ The February Final Rules amended this rule by modifying the reporting requirement to include an unaudited report of the number of credit rating actions during the fiscal year in each class of credit rating for which the NRSRO is registered with the Commission. The term "credit rating actions" includes upgrades, downgrades, placements on credit watch, and withdrawals.

4. Amendments to Rule 17g-5 – Conflicts of Interest

Lastly, the February Final Rules adopted three amendments to Rule 17g-5, which regulates conflicts of interest.¹⁶⁰ The first amendment added paragraph (c)(5), which prohibits an NRSRO from issuing a credit rating with respect to an obligor or security where the NRSRO or its affiliate made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the structure of the security, the assets, the liabilities, or the activities of the obligor or issuer of the security.¹⁶¹ The second amendment added paragraph (c)(6), which prohibits a person within an NRSRO who has responsibility for participating in determining credit ratings or for developing or approving ratings from participating in discussions, negotiations, or arrangements.¹⁶² The third amendment added paragraph (c)(7), which prohibits an NRSRO from allowing a credit

¹⁵⁸ *Id.* at 6457.

¹⁵⁹ *Id.* at 6464.

¹⁶⁰ *Id.*; see 17 C.F.R. §240.17g-5 (2009).

¹⁶¹ February 2009 Final Rules, *supra* note 148, at 6465-67.

¹⁶² *Id.* at 6467-68.

analyst who participated in determining or monitoring the rating to receive gifts, or other benefits, from the obligor being rated or from the issuer, underwriter, or sponsor of the securities being rated.¹⁶³

B. SEC Final Rules: October 5, 2009

October 5, 2009, the SEC adopted rules eliminating certain references to credit ratings issued by NRSROs in Rules 5b-3 and 10f-3 under the Investment Company Act of 1940 to address concerns that these references may have contributed to an undue reliance on those ratings by market participants.¹⁶⁴ Rule 5b-3 initially provided that a fund may treat refunded securities as government securities for the diversification requirements of Section 5(b)(1) of the Investment Company Act if an independent public accountant certified that the required escrowed securities will satisfy all scheduled payments or if the refunded security received a debt rating in the highest category from an NRSRO.¹⁶⁵ Rule 10f-3 initially permitted a fund to purchase “eligible municipal securities” from an underwriting syndicate including an affiliate, which include securities that have a certain rating from an NRSRO.¹⁶⁶ In the October Rules, the SEC eliminated references to NRSRO ratings in these Rules and revised the definition of eligible municipal securities to include securities that are sufficiently liquid that they can be sold at or near their carrying value within a reasonably short period of time and are subject to certain credit risks.

C. SEC Final Rules: November 23, 2009

On November 23, 2009, the SEC adopted final rules (“November Rules”) that increased disclosure requirements for CRAs by modifying Rule 17g-2, paragraph (d), and Rule 17g-5, para-

¹⁶³ *Id.* at 6468-69.

¹⁶⁴ References to Ratings of Nationally Recognized Statistical Rating Organizations, 74 Fed. Reg. 52, 374 (Oct. 9, 2009) [hereinafter October 2009 Final Rules].

¹⁶⁵ *Id.* at 52, 362-63; see 17 C.F.R. §270.5b-3 (2009).

¹⁶⁶ October 2009 Final Rules, *supra* note 164, at 52, 363-64; see 17 C.F.R. §270.10f-3 (2009).

graphs (a) and (b).¹⁶⁷ The November Rules modified paragraph (d) of Rule 17g-2 by increasing the disclosure of credit ratings history information to 100% for ratings initially determined on or after June 26, 2007. This was an increase from the aforementioned 10% requirement under the February Final Rules. The November Rules modified paragraphs (a) and (b) of Rule 17g-5 by requiring NRSROs hired by issuers, sponsors, or underwriters to inform other NRSROs that the arranger is soliciting credit ratings. They also required NRSROs to obtain representations from the arranger that the arranger will provide information given to the rating NRSRO to non-rating NRSROs.

Along with the modifications to Rule 17g-5, paragraphs (a) and (b), the November Rules added paragraph (e), which provides an annual certification requirement for non-rating NRSROs that want to receive information pertaining to rated securities under paragraphs (a) and (b). Specifically, paragraph (e) certifies that the non-rating NRSRO is accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using that information.

Lastly, the November Rules amended Regulation FD, which prohibits issuers from disclosing non-public information in a piecemeal fashion.¹⁶⁸ The November Rules amended Regulation FD by allowing disclosure of material non-public information to an NRSRO regardless of whether the NRSRO makes its ratings publicly available. These amendments became effective on February 1, 2010. Their compliance date is June 2, 2010.

V. PROPOSAL: HANDICAPPING THE CREDIT RATING AGENCIES

So far, the reforms adopted by the SEC go a long way to increasing the disclosure requirements for CRAs. However, these reforms are certainly not enough because the disclosure requirements will create a hodgepodge of information for market participants to digest. In addition, the disclosure requirements increase regulatory compliance costs, which will ultimately in-

¹⁶⁷ Amendments to Rules for Nationally Recognized Statistical Rating Organizations, 74 Fed. Reg. 63, 832 (Dec. 4, 2009), <http://www.sec.gov/rules/final/2009/34-61050fr.pdf>; see also 17 C.F.R. §240.17g-2(d), -5(a) to (b) (2009).

¹⁶⁸ *Id.* at 63, 850; see 17 C.F.R. §243.100 to .103 (2005).

crease the barriers to entry and preserve the large CRAs' market share.

To have meaningful reform, the SEC must create a mechanism that will hold CRAs accountable for issuing inaccurate ratings. Because CRAs are for profit companies, the term "accountable" means that the mechanism must detrimentally affect their revenue streams when they issue inaccurate ratings. This will deter the conduct that has put the credit rating industry in its current state of disrepair.

A. *Option to Reform: Disclosure-Based Approach*

There are different options to consider in creating a proper mechanism that encourages accurate credit ratings. The American financial system favors disclosure-based regulations because transparency enables investors to conduct their own due diligence on financial products before they invest.¹⁶⁹ Accordingly, CRA disclosure requirements will supposedly introduce an element of accountability in the ratings business because market participants can compare the performance of rating firms across the board and choose the rating with the best performance. A benefit of the disclosure-based approach is that it relies on investors to process information and, in doing so, polices the market.¹⁷⁰ This minimizes costs in processing the information, creating models, and hiring educated personnel to rate each security.¹⁷¹

Nonetheless, market characteristics leading up to the current economic crisis suggest that this approach will not effectively prevent a future economic crisis. As an initial matter, disclosure-based regulation assumes that free market forces—i.e., the risk of losing money—will encourage prudent investors to perform their own due diligence before they buy ownership interests in certain financial products. While this assumption is

¹⁶⁹ See generally CHOI & PRITCHARD, *supra* note 21, at 22-34 (discussing the incentives and requirements of the disclosure based system).

¹⁷⁰ This is consistent with the goal of the SEC in reforming CRAs. See February 2009 Final Rules, *supra* note 148, at 6456.

¹⁷¹ See Hill, *supra* note 12, at 81 (detailing the personnel investment required to rate emerging financial instruments of "staggering complexity.").

often true during rigorous economic conditions when investors are skeptical about potential profits and naturally adverse to risk, it often does not apply during a prolonged boom economy when free market forces are less influential and investors blindly ride market momentum and forgo due diligence procedures.¹⁷²

In addition, another drawback to disclosure-based regulations is the resulting quantity of complex information that market participants must evaluate in performing a due diligence analysis. A lesson learned from the current financial crisis is that many investors, including large institutional investors, relied heavily on CRAs because they did not have the expertise to properly perform due diligence on complex investments like mortgage-backed securities. Furthermore, the crisis also taught us that statistical data was irrelevant in rating new mortgage-backed securities because the quality of the mortgages underlying each security deteriorated year over year. As such, it is unlikely that investors will be willing and able to properly incorporate statistical data on past ratings, modified ratings, rating procedures, and information detailing an agency's rating methodologies into their due diligence procedures.¹⁷³

¹⁷² Professor Robert Shiller builds on the Keynesian theory of animal spirits by suggesting that investor confidence is not always rationally based in a market bubble environment. See Robert J. Shiller, *Animal Spirits Depend on Trust: The Proposed Stimulus Isn't Big Enough to Restore Confidence*, WALL ST. J., Jan. 27, 2009, at A15; see also COFFEE, GATEKEEPERS, *supra* note 2, at 67-69 ("[I]n an atmosphere of market euphoria, investors rely less on gatekeepers, and managements in turn regard them as more a formality than a necessity."). Rather, he suggests that investor's confidence is sometimes based on blind emotional trust that dismisses instinctive doubts about other players in the market. See *id.* Such blind emotional trust often occurs during prolonged periods of market growth when memories of less prosperous times are faded. See *id.* According to this theory, market participants will likely conduct their own due diligence during non-boom times. Therefore, our regulatory need for CRAs only really exists during the good economic conditions when investor due diligence naturally declines. See *id.*

¹⁷³ See White, *The Credit Rating Industry*, *supra* note 98, at 14 (discussing the ineffectiveness of statistical data). Professor Coffee also has argued that default statistics disclosed by the CRAs are useless because the numbers are "as cooked as Enron's books." COFFEE, *supra* note 2, at 285-86; John C. Coffee Jr., *SEC's New Rules Fail to Address Key Rating Issues*, 241 N.Y.L.J. 5 (Jan. 15, 2009).

B. Option For Reform: Government Ratings

Another way to reform the market is to create a government entity that provides an independent rating to financial products—a U.S.D.A.-like Seal of Approval for the financial industry. This method makes sense from a theoretical standpoint because governmental regulatory agencies like the SEC are neutral parties that should be well suited to protect the integrity of the broader financial market. However, pursuing this option would be redundant because rendering objective ratings is the reason we incorporated rating agencies into the regulatory structure in the first place.

Creating a system that relies on government-issued ratings would also be costly because the system would consume a substantial amount of government resources that would compromise the government's ability to regulate other areas of the market.¹⁷⁴ In other words, if policymakers assign the task of rating financial products to the SEC, the SEC would have to dedicate resources that would otherwise be used to investigate other fraudulent behavior within the financial system. The failure of the SEC in the Bernard Madoff case provides an example of how the SEC already faces challenging regulatory duties in overseeing fraudulent conduct in the markets.¹⁷⁵ In fact, in the aftermath of the Madoff scandal, former SEC officials admitted that the regulatory oversight of the SEC is lacking because it cannot pay the salaries that would be required to hire the appropriate personnel to assess complex financial products.¹⁷⁶

¹⁷⁴ Some might argue that increased responsibility would be good for an agency's morale, however, commentators have noted that increased enforcement duties negatively affect the SEC's personnel turnover rate. For example, after Congress passed Sarbanes-Oxley, the SEC's turnover rate increased to 9.1%. See Gregory W. Smith, *The Deterioration of Investor Tools and the Resulting Fiduciary Challenges*, J. GOV'T FIN. MGMT., Oct. 1, 2008, at 26.

¹⁷⁵ *Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises*, 111th Cong. 13-15 (2009) (testimony of Harry Markopolos) (discussing the SEC's failure to investigate Bernard Madoff after whistleblower warnings).

¹⁷⁶ Recently, former SEC chairman Harvey Pitt joined prominent short seller Jim Chanos and Nobel Laureate Elie Wiesel on a panel discussing the Bernard Madoff scandal and ways to prevent future fraud in the financial markets. See Portfolio Staff, *Wiesel Lost "Everything" to Madoff*, PORTFOLIO.COM, Feb. 26, 2009, available at <http://www.portfolio.com/executives/2009/02/26/Elie-Wiesel-and-Bernard-Madoff>. In his

Consequently, there is “a lack of real sophistication” at the SEC, which would undoubtedly affect the quality and trustworthiness of government ratings.¹⁷⁷

Furthermore, if the SEC started to issue its own ratings, the government would have to increase the agency’s funding to oversee existing financial products and other new financial products entering the market. This would shift the costs of rating financial products from the investors, who have a financial interest in the rating, to the taxpayer. With current CRA business models, the cost of the credit ratings flows to those that financially benefit from the ratings, either the investors (in the issuer-paid business model), or the subscribers (in the subscription-based business model). However, if the government issued ratings, taxpayers would be responsible for paying the costs of those ratings through a larger SEC budget, thereby effectively subsidizing investors’ due diligence costs. This is not an equitable result because taxpayers with no interest in an investment should not bear its due diligence costs. Instead, due diligence costs should be incorporated into a security’s price. This would effectively make the investor, who is trying to profit from the investment, pay for the due diligence of that investment. If these costs exceed the potential profits, the investment should not be sold in the market.

C. Option For Reform: Handicapping the Credit Rating Agencies

A third option for policymakers and regulators to reform the credit rating industry is to adopt a handicapping system that essentially ties the past performance of a rating agency with the regulatory benefits derived from its credit rating. This system would incentivize CRAs to accurately measure risks of particular investments, which would counter-balance any conflicts of interest within the issuer-paid business model. It would

comments, Pitt said that the SEC does not have enough resources to uncover fraud in the financial markets because “You can’t take young people, two, three, four years out of college, pay them \$50,000, \$60,000, \$70,000, and expect them to have the sophistication to assess a \$20 billion hedge fund.” *Id.*

¹⁷⁷ *Id.* (quoting former SEC chairman Harvey Pitt).

also enable the market participants to choose the most accurate CRA to rate their security.

Handicapping the CRAs would be similar to golf handicaps. In golf, the term "handicap" refers to a numerical advantage given or disadvantage imposed to account for past performance.¹⁷⁸ The purpose of the handicap is to level the playing field between golfers of different skill levels.¹⁷⁹ It accomplishes this by giving less skilled golfers a scoring advantage over their competitors. The size of the advantage is determined by the difference between the two golfers' playing ability. If the difference of the average scores between the two golfers is five strokes, then the handicapping system will subtract five shots from the lesser player's score.

For example, suppose Golfer A averages 75 strokes on a par 72 course and Golfer B averages 80. Golfer A would have a handicap of 5 and Golfer B would have a handicap of 10. As such, when Golfer A plays Golfer B, Golfer B would receive a 5-stroke advantage. This means that Golfer B would get to subtract 5 strokes from his final score and the lowest of the two scores wins.¹⁸⁰

To further explain this concept, consider this hypothetical: Mike has a 2 handicap and he plays against Tom who has a 10 handicap. If Mike hits the ball 76 times (gross score), his net score is 74 ($76 - 2 = 74$). If Tom hits the ball 83 times (gross score), his net score is 73 ($83 - 10 = 73$). Although Mike hit the ball less times than Tom, Tom's handicap adjusted his net score below Mike's net score. In other words, Tom played better than Mike after considering each golfer's capabilities. Therefore, Tom wins.

The value of golf's handicapping system to the credit rating industry lies in its ability to predict each golfer's future performance based on their past performance.¹⁸¹ The system effec-

¹⁷⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1027 (1986).

¹⁷⁹ See John Paul Newport, *The Genius of Handicapping – The Beauty of Golf's Scoring System Is That It Levels the Playing Field for All Players*, WALL ST. J., Nov. 1, 2008, at W6.

¹⁸⁰ Subtracting from a golfer's final score is an advantage in golf because it is better to have less strokes—i.e., hit the ball a fewer amount of times.

¹⁸¹ As used in the game of golf and defined in *Webster's Dictionary*, a handicap normally provides "an advantage to the weaker contestant or imposes a disadvantage on a

tively alters the value of each stroke depending on each player's ability. In applying this to credit ratings, the SEC could create CRA handicaps that forecast the likelihood of an issuer's rating. The information used to calculate the future performance would comport with information that is currently required to be disclosed—e.g., the accuracy of the CRA's past ratings, the CRA's accuracy in rating similar types of debt or securities, and the timeliness of its downgrades.

However, unlike current disclosure requirements, CRAs would not need to disclose their rating methodologies. This would prevent other rating agencies from pirating models and mathematical formula's developed by other CRAs, which would in turn encourage CRAs to invest in those models and formulas. Furthermore, different handicaps would be issued for different financial products. This would further the handicapping system's focus on the core issue of rating accuracy, not the periphery issues of what business model presents the least amount of conflict, or what rating methodology is best for certain types of investments.

After calculating a CRA's handicap, the SEC would incorporate the handicap into the regulatory structure by adjusting the CRA's credit ratings according to the handicap. For example, if Issuer A hires CRA X to rate a mortgage-backed security. After engaging in the rating process, CRA X issues a AA credit rating on the security's senior tranche. With the handicapping system, this initial rating would be called the "gross rating" (i.e., unadjusted rating). After CRA X issues the gross rating, the SEC would apply CRA X's handicap to determine the "net rating" (i.e., adjusted rating). If CRA X has a bad track record in rating other mortgage-backed securities or has been late to downgrade its ratings, the handicap could potentially reduce the gross rating from AA to A. If CRA X's track record so warrants, the

stronger candidate." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 178, at 1027. However, *Webster's Dictionary* also describes the term "handicapping" to mean the "the odds of predicting a winner..." *Id.* As applied to credit ratings, it is logical to predict the most inaccurate credit ratings by imposing disadvantages—i.e., reducing their ratings—on the CRAs that have issued inaccurate ratings in the past. Similarly, it is logical to predict the most accurate credit ratings by providing an advantage to CRAs that have issued accurate ratings in the past.

handicap could even reduce the rating of AA to BBB, or lower. This would substantially limit the pool of potential buyers and increase the costs to fund the securities' issuance.¹⁸² With increased issuing costs, issuers would seek alternative CRAs. This would negatively affect the demand for their ratings.

D. Effects of Handicapping

A handicapping system would be the best mechanism to ensure accurate credit ratings for the following reasons:

1. Comparing CRAs: Handicapping credit ratings would allow investors to compare CRAs more efficiently than they could under the SEC's current proposals. The SEC's current proposals require market participants to analyze a hodgepodge of information that would not sufficiently deter the type of reckless investing that leads to economic busts like the one that started in 2007. Under a handicapping system, market participants will be able to understand the handicaps because the handicaps would be represented by letters or numbers that easily reflect the competence of a CRA—like the ratings themselves.
2. Financial Incentives: By enabling market participants to gauge the accuracy of a CRA's ratings, handicaps would create financial incentives for CRAs to focus on accuracy that would mitigate conflicts of interest presented by the issuer pays business model.
3. Focus On Accuracy: Incorporating handicaps will limit the disclosure of rating methodologies because evaluating the actual performance of the initial rating and the surveillance efforts will be the only relevant consideration. As in golf, some individuals with unorthodox golf swings turn out to be great golfers. Likewise, unconventional rating methodologies might turn out to be more effective than more widely accepted methods.

¹⁸² Unterman, *supra* note 50, at 90-91 & n.46.

4. Reducing Costs of Regulatory Compliance: Limiting disclosure requirements (not record retention) would also reduce the financial burdens of regulatory compliance. This would lower barriers to entry in the market and would encourage more competition within the credit rating industry. Unlike the suggested reform of eliminating the NRSRO designation altogether, increased competition will not lead to a race to the bottom approach because of the threat of lost profits from bad handicaps.

5. NRSRO Qualification Criteria: Handicapping the CRAs would also provide a legitimate qualification criteria for becoming an NRSRO. Statistically, the SEC must collect a number of past ratings to accurately calculate a CRA's handicap. Thus, after the SEC determines the number of ratings mathematically required, it could use that amount as the threshold requirement for NRSRO admittance.

6. Level Playing Field: With separate handicaps for different types of securities, the SEC would level the playing field between small CRAs and large CRAs. Ideally, smaller CRAs could outperform the larger CRAs if they develop superior modeling techniques by specializing in a particular field within the financial system. In fact, some CRAs have already adopted this business model. For example, A. M. Best Co. has developed a niche in insurance.¹⁸³ According to its website, A.M. Best is "[t]he largest and longest-established company devoted to issuing in-depth reports and financial strength ratings about insurance organizations. Its flagship publication and database, Best's Insurance Reports, offers the largest coverage of insurers and reinsurers in the United States, Canada, the United Kingdom and worldwide of any in-

¹⁸³ See A.M. Best, Best's Credit Ratings and Analysis, available at <http://www3.ambest.com/ratings/default.asp> (last visited on Apr. 11, 2009); COFFEE, GATEKEEPERS, *supra* note 2, at 300-02 (discussing rating agencies that have developed specialized rating services).

teractive rating organization.”¹⁸⁴ Similarly, smaller CRAs could eventually emerge in the mortgage-backed securities market and outperform larger CRAs like Moody’s or S&P.

However, as with other proposals currently under consideration, policymakers might encounter a few hurdles in implementing a handicapping system. Currently, the following three issues arise:

1. How to Calculate the Handicap: As in golf, financial regulators will likely have trouble “getting everyone to agree on a uniform method for calculating [the handicap].”¹⁸⁵ Political pressures will undoubtedly create deadlock in determining the exact equation.¹⁸⁶
2. Reliance on Historical Data: Handicaps might be ineffective in preventing a crisis similar to the current economic crisis because, like current modeling techniques, handicaps are based on historical performance. When economic events like the housing crisis have no historical precedent, handicaps will be useless in protecting investors from unforeseen market conditions.
3. Large Capital Investment: Creating the handicapping system will take a large capital investment and constant maintenance to be current and relevant to the marketplace. But, these maintenance requirements will be less invasive and cheaper than directly overseeing the business operations of the CRAs.

¹⁸⁴ A.M. Best, About A.M. Best, available at <http://www.ambest.com/about/> (last visited Apr. 11, 2009).

¹⁸⁵ See Newport, *supra* note 179 (discussing the problems that golf experienced when trying to form a handicap).

¹⁸⁶ See FRANK PARTNOY, *FIASCO: THE INSIDE STORY OF A WALL STREET TRADER* 250 (Penguin Books 1999) (discussing “health campaign contributions” and the persuasion of our elected representatives) but see Jonathan R. Macey, *Wall Street Versus Main Street: How Ignorance, Hyperbole, and Fear Lead to Regulation*, 65 U. CHI. L. REV. 1487, 1506 (1998) (countering Professor Partnoy’s assertions).

CONCLUSION

After every financial crisis, regulators and experts revisit regulations governing the CRAs and debate over implementing reforms of the industry. During this crisis, one is hopeful that they act to reform the credit rating industry. As government sanctioned gatekeepers, CRAs are uniquely positioned within the financial market to act as strong regulators. Correctly utilizing them would balance the inefficiencies of government and the unreliability of the free market.

However, as this article shows, current regulations and lack of competition do not encourage CRAs to accurately rate complex investment vehicles like mortgage-backed securities. Instead, these problems cause CRAs to use their government-sanctioned position as a financial gatekeeper to make enormous profits and preclude competitors from entering the market. Ultimately, this causes an unfounded sense of wellbeing amongst investors in the financial market.

This article suggests that the SEC's current proposals are not sufficient to fix the problems that have plagued the credit rating industry for decades. Therefore, policymakers and regulators should implement a handicapping system to bolster the proposed disclosure requirements. This reform will create penalties for CRAs that inflate their rating for a given security, causing them to focus on developing the models and hiring the people required to issue an accurate rating. In addition, handicaps will level the playing field by allowing other smaller CRAs to issue ratings for regulatory purposes. In the end, this reform will help make the financial market more transparent, efficient, and reliable.



DISCLOSURE, INFORMATION, THE LAW OF CONTRACTS, AND THE MISTAKEN USE OF *LAIDLAW V. ORGAN*

Joshua Kaye*

INTRODUCTION

One of the central questions debated by scholars of the common law of contracts is what a contracting party, absent a special relationship otherwise creating a duty to disclose, must reveal to a counterparty. Almost without exception, contributors to this discourse discuss Chief Justice John Marshall's 1817 opinion: *Laidlaw v. Organ*.¹ They must. It is the case in which Chief Justice Marshall first introduced the rule of *caveat emptor* to the young American common law. Moreover, as Morton Horwitz notes, *Laidlaw* was "one of the first cases to come before the Court involving a contract for future delivery of a commodity."² Consequently, *Laidlaw* has maintained a central position in scholarly discourse,³ is regularly included in casebooks and hornbooks on contracts,⁴ and has been cited in over one hundred

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¹ *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817).

² MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 182 (1977).

³ Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795 (2005). Krawiec and Zeiler, while stating the facts of *Laidlaw* no more correctly than their peers, do an excellent job summarizing the larger literature on the questions related to common-law disclosure requirements, almost all of which center on *Laidlaw*.

⁴ See, e.g., RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 1055-59 (3d ed. 2003); JOEL PRENTISS BISHOP & MARION C. EARLY, *COMMENTARIES ON THE LAW OF CONTRACTS* 277 (2d ed. 1907); DAVID G. EPSTEIN ET AL., *MAKING AND DOING DEALS:*

judicial opinions⁵—among them, several recent decisions from the Seventh Circuit.⁶

This article is principally concerned with the facts of *Laidlaw* and how an accurate understanding of these facts should shape our understanding of Chief Justice Marshall's opinion. After setting out how commentators have understood the facts of the case until now, this article uses a combination of widely-available works by other historians and primary sources to show how the actual events that gave rise to the controversy at issue in *Laidlaw* are in fact quite different than they have previously been understood.⁷

The balance of the article is devoted to the implications of this misunderstanding, the most proximate of which is that Chief Justice Marshall's opinion in *Laidlaw* does not support the conclusions that recent commentators have drawn from it. In particular, this article considers works by Professors Anthony Kronman⁸ and Kim Lane Scheppele,⁹ which advance competing meta-theories purporting to explain how and why the common law distinguishes between similar circumstances to require a contracting party to disclose material information to a counterparty in some situations but not others. Both scholars rely heavily on the facts of *Laidlaw*, but neither presents those facts accurately.

CONTRACTS IN CONTEXT 370-71 (2d ed. 2006); E. ALLAN FARNSWORTH, CONTRACTS 239 (4th ed. 2004); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 640-41 (3d ed. 1993); W.S. PATTEE, ILLUSTRATIVE CASES IN CONTRACTS 337 (1893); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 476-79 (3d ed. 2002).

⁵ A search of Westlaw shows *Laidlaw* cited in 104 federal and state opinions.

⁶ See, e.g., *Emerald Inv. Ltd. P'ship v. Allmerica Fin. Life Ins. & Annuity Co.*, 516 F.3d 612, 616 (7th Cir. 2008); *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 580 (7th Cir. 2004); *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991); *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985).

⁷ By writing about only one case and focusing on only two articles, I have somewhat circumscribed my argument in a way that broader empirical studies are not. See, e.g., Krawiec & Zeiler, *supra* note 3. Krawiec and Zeiler test several "meta-theories" purporting to explain common law disclosure rules, most of which are based on *Laidlaw*, against an empirical study of more than 400 common law cases. *Id.* at 1833.

⁸ Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

⁹ KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW (1988).

Yet the implications of the widespread misunderstanding of the facts of *Laidlaw* are broader than the subject matter for which the case is most frequently cited. The misuse of *Laidlaw* could have been avoided had legal commentators been mindful of the historical context in which Chief Justice Marshall wrote his decision. Social and legal norms in the antebellum United States, particularly with regard to public officials using inside information for personal profit, were not the same in 1817 as they are today. An understanding of the perspective from which Chief Justice Marshall saw the case helps explain why certain facts of *Laidlaw* that are highly relevant from a modern perspective were not, to Chief Justice Marshall, worth mentioning.

I. THE CURRENT (MIS)UNDERSTANDING OF *LAIDLAW*

Laidlaw v. Organ is one of the seminal cases in the development of American contract law.¹⁰ Chief Justice Marshall sets out the rule that a buyer has no duty to disclose valuable extrinsic information known only to him, “where the means of intelligence are equally accessible to both parties.”¹¹ For legal commentators, this rule has proved puzzling when considered in contrast with similar circumstances where courts have reached the opposite result.¹² Though Chief Justice Marshall’s statement

¹⁰ See Krawiec & Zeiler, *supra* note 3, at 1798. *Laidlaw* is widely recognized in the literature as a foundational case in American contract law. It is widely cited in scholarly work on the area, and is regularly taught in first year contracts classes. It was also recognized as significant at the time it was decided. Legal commentator Gulian Verplanck wrote an influential extended essay in direct response to the decision that is widely regarded as one of the foremost statements on contracts from the period. GULIAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS BY CONCEALMENT, ERROR, OR INADEQUATE PRICE (photo. reprint 2006) (1825). For more discussion on Verplanck and *Laidlaw*, see discussion *infra* Part III.B.

¹¹ *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 195 (1817).

¹² See, e.g., *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887) (denying buyer’s suit to replevy Rose, a cow sold under the mistaken belief that she was infertile); *Obde v. Schlemyer*, 56 Wash. 2d 449 (1960) (holding that defendants who knowingly sold a termite-infested house to plaintiffs had a duty to disclose under tenets of “justice, equity, and fair dealing”), cited in Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 134 (1982); *Wood v. Boynton*, 64 Wis. 265 (1885) (denying seller’s action for restitution following her sale of a small stone for a small amount of money which she later learned to be an uncut diamond), cited in Deborah A. DeMott, *Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions*, 19 DEL. J. CORP. L. 65, 83 (1994).

of the law is dicta,¹³ commentators have naturally turned to the facts of *Laidlaw* to help them reconcile the divergent outcomes.

Though the record in *Laidlaw* is anything but clear, commentators have all gleaned roughly the same facts and present them in the following manner: Hector Organ was a New Orleans tobacco merchant who, early on the morning of February 19, 1815, learned that the Treaty of Ghent had been signed. The treaty ended the War of 1812 and signaled that the British blockade of New Orleans that had kept prices unnaturally low would imminently be lifted. So informed, Organ quickly completed negotiations to purchase a large amount of tobacco from the Peter Laidlaw Company. Before they finalized the transaction, the representative of the Laidlaw Company "asked if there was any news which was calculated to enhance the price or value of the article about to be purchased."¹⁴ It is unclear how Organ responded, as the trial court did not investigate whether Organ made any fraudulent statements or instead remained silent.

What is clear, however, is that the representative of the Laidlaw Company remained in the dark about the treaty. A few hours after the two completed their agreement, news of the treaty became public, and the price of tobacco rose by thirty to fifty percent.¹⁵ Laidlaw then refused to release the tobacco from its warehouse when Organ's agents came to collect the purchased tobacco that afternoon. Organ subsequently brought suit to recover damages and to block Laidlaw from otherwise disposing of the goods. The district court directed a verdict for Laidlaw, and Organ then appealed to the Supreme Court.¹⁶

In presenting these facts, however, commentators have failed to accurately characterize Organ's source of the news of the truce. Some simply pass over the question entirely, saying

¹³ Chief Justice Marshall's statement of the law is dicta because he remanded the case to the district court to determine if, in fact, there had been an affirmative misrepresentation or merely silence. See *Laidlaw*, 15 U.S. (2 Wheat.) at 195. Such an inquiry was not made by the district court in the first instance. *Id.* at 183-84.

¹⁴ *Id.* at 183.

¹⁵ *Id.*

¹⁶ Louisiana was not assigned to a judicial circuit at the time, so the appeal went directly from the district court to the Supreme Court.

that he acquired the information “from some private source.”¹⁷ Others go into a bit more detail, explaining that the three gentlemen mentioned by name in the reporter’s notes to Chief Justice Marshall’s opinion,¹⁸ Messrs. Livingston, White, and Shepherd, had brought the news from the British fleet and that Shepherd conveyed the information to his brother who was Organ’s partner in the deal, and Organ learned the information from him.¹⁹

Yet, all of these accounts leave key questions about Livingston, White, and Shepherd and their roles in Organ’s acquisition of the valuable information unasked. Who were these three men and what were they doing at the British fleet in the first place? How and why were they in the position to get the valuable information before it became publicly available?²⁰ Given that much of the literature discussing *Laidlaw* contrasts the facts of the case with other similar circumstances in which courts arrived at the opposite outcome, an accurate understanding of how Organ acquired the valuable information would seem highly important.

Below, this article shows that Livingston, White, and Shepherd were with the British fleet serving as the delegation representing the American military leadership in the region under direct orders from General Andrew Jackson. Further examination of New Orleans in the beginning of 1815 shows that military control over the city was near-complete and, consequently, that Livingston, White, and Shepherd were uniquely privileged

¹⁷ See, e.g., Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 426 (1995).

¹⁸ The reporter’s notes draw heavily from the briefing at the district court, at times quoting from it directly, making clear that Livingston, White, and Shepherd’s identities were apparent to Marshall.

¹⁹ See Kronman, *supra* note 8, at 10; M. H. Hoeflich, *Laidlaw v. Organ*, *Gulian C. Verplanck, and the Shaping of Early Nineteenth Century Contract Law: A Tale of a Case and a Commentary*, 1991 U. ILL. L. REV. 55, 56.

²⁰ To the extent commentators have addressed these questions, the answers have been unsatisfactory. Anthony Kronman includes the parenthetical aside: “(What Shepherd’s brother and his companions were doing with the British Fleet is not disclosed.)” Kronman, *supra* note 8, at 10. Kim Lane Scheppele goes further, saying that Organ learned the news from “three American merchants who happened to be sailing with the British fleet at the time that the fleet heard the news of the treaty.” SCHEPPELE, *supra* note 9, at 7. See discussion of Scheppele *infra* Part III. B.

in their ability to travel to the British fleet and thus privileged in their early knowledge of the treaty because of their connection to the military.

II. WHAT ACTUALLY HAPPENED IN *LAIDLAW*

A. New Orleans During the War of 1812

The first several years of the War of 1812 did not go as its American proponents had hoped. The expedition into British Canada was rebuffed; America's shores were blockaded, and her capital razed. Originally conceived of as a struggle against "[t]he mad ambition, the lust of power, and commercial avarice of Great Britain,"²¹ by 1814 some feared that the war had devolved into a second struggle for American independence from the British crown.²²

While the red-coated British army was fearsome, one of the most effective weapons the British deployed against their former colonies was a naval blockade that, by April 1814, extended the entire length of the coast, drastically reducing the volume of American trade.²³ For the port city of New Orleans, this meant that agricultural goods sent down the Mississippi River that would otherwise have been sold and shipped were instead left accumulating in warehouses. Consequently, along with the city's inherent strategic importance at the mouth of the river, the amassed commodities, valued by one historian at over fifteen million dollars, made New Orleans a ripe target.²⁴ The glut

²¹ STAFF OF S. COMM. ON FOREIGN RELATIONS, 12TH CONG., REPORT ACCOMPANYING DECLARATION OF WAR (1812), reprinted in GEORGE COGGESHALL, HISTORY OF THE AMERICAN PRIVATEERS AND LETTERS-OF-MARQUE, DURING OUR WAR WITH ENGLAND IN THE YEARS 1812, '13, AND '14, at xxiv (1861).

²² See generally, DONALD R. HICKEY, THE WAR OF 1812: A FORGOTTEN CONFLICT (1989) (pay specific attention to Chapter 8).

²³ See, A. T. MAHAN, 2 SEA POWER IN ITS RELATIONS TO THE WAR OF 1812, at 10-11 (London, Sampson, Low, Marston & Co. 1905). American exports dropped from \$61,300,000 in 1811 to \$6,900,000 in 1814. Similarly, imports dropped from a high of \$53,400,000 in 1811 to \$13,000,000 in 1814. Hickey, *supra* note 22, at 214-15.

²⁴ For example, sugar was so plentiful that one British officer who fought with the invasion force later recalled that, rather than using earth to build defenses, the American defenders rolled hogsheads of sugar valued at "many thousand pounds sterling" to the front and placed them upright to form parapets. GEORGE ROBERT GLEIG, A NARRATIVE OF THE CAMPAIGNS OF THE BRITISH ARMY AT WASHINGTON AND NEW

of commodities also had the effect of driving prices down. Shrouded by the British blockade's effect on the price of tobacco, the dispute in *Laidlaw v. Organ* arose.

B. The Battle of New Orleans and Its Aftermath

The long-feared British offensive against New Orleans began in December 1814, and General Andrew Jackson's ultimately successful defense of the city was one of the most celebrated victories of the otherwise disappointing American war effort. Commanding a combined force of 4700 regular army and volunteer troops in the city's defense, Jackson repelled a British assault of over 5300 men that included veterans of Wellington's victorious campaign against Napoleon.²⁵ Suffering the loss of barely seventy men, compared to the British casualties of over 2000, and the capture of another 500, Jackson, the "Hero of New Orleans," took a place in nineteenth-century American lore comparable to Henry V in Britain's lore after Agincourt.²⁶

While the Americans won the decisive victory on January 8, 1815, it took the British most of the rest of the month to retreat in force: first because they were pinned down by American artillery, and then because evacuating their wounded and burying their dead were such onerous tasks. On January 27, the surviving British troops, with escaped American slaves in tow, finally

ORLEANS 315 (London, John Murray, Albemarle-Street 1821); See also GILBERT AUCHINLECK, *A HISTORY OF THE WAR BETWEEN G.B. AND THE U.S. OF AM. DURING THE YEARS 1812, 1813, AND 1814*, at 387 (London, Arms and Armour Press 1972) (1855).

²⁵ HICKEY, *supra* note 22, at 211. The American victors took pride in the fact that the British forces that they had opposed included veterans of Wellington's army. Jackson wrote to another American General with pride that he "defeated this Boasted army of Lord Wellington[s]." Letter from Andrew Jackson to James Winchester (Jan. 19, 1815), in 3 *THE PAPERS OF ANDREW JACKSON, 1814-1815*, at 252 (Harold D. Moser, David R. Hoth, Sharon Macpherson & John H. Reinbold eds., 1991). In a letter to James Brown a few days later, Jackson refers to the British force as the "choice of Wellington[s] army." Letter from Andrew Jackson to James Brown (Jan. 26, 1815), in 3 *THE PAPERS OF ANDREW JACKSON*, *supra*, at 252.

²⁶ In a congratulatory letter to Jackson, James Monroe, then the Secretary of War, wrote: "History records no example, of so glorious a victory, obtained, with so little bloodshed, on the part of the victorious." Compare Letter from James Monroe to Andrew Jackson, (Feb. 5, 1815), in 3 *THE PAPERS OF ANDREW JACKSON*, *supra* note 25, at 271, with WILLIAM SHAKESPEARE, *KING HENRY THE FIFTH* act 4, sc. 8 ("This note doth tell me of ten thousand French [t]hat in the field lie slain . . . and of all other [English] men [b]ut five-and-twenty.").

boarded their ships. Unfavorable winds further delayed the British return to the Gulf until February 4.²⁷

Though Jackson and his troops were showered in flowers and hailed as heroes upon their return to the city, they had not won the war, and peace did not seem imminent.²⁸ The British army, though in retreat, retained enough strength that its commanders intended to regroup and move east to attack Mobile. More importantly to New Orleans merchants, the powerful British Navy remained off the coast enforcing the blockade. The stocks of sugar, cotton and tobacco in New Orleans' warehouses continued to mount.

Even as the British completed their retreat, several issues remained unresolved between the parties. The most pressing concern was the exchange of prisoners. Some had already been swapped pursuant to an agreement reached on January 17, but many remained, and their exchange needed to be negotiated.²⁹

Another concern for the Americans was the continued presence of the escaped slaves with the British fleet. Though the British were not detaining the escaped slaves, they also declined to use force to compel them to return to bondage. British General Sir John Lambert wrote to General Jackson, not without irony: "I did all I could to persuade [the slaves] to return at the time, but not one was willing."³⁰

Of less broad consequence, but still important to the prideful Jackson, was a request from British Major General John Keane for the return of his sword, which he had lost on the battlefield. While Jackson considered the sword to be his as a prize of war, he gleefully embraced the disgrace the Major General

²⁷ GLEIG, *supra* note 24, at 348-49.

²⁸ For a contemporary account of Jackson's return to the city, see ARSÈNE LACARRIÈRE LATOUR, *HISTORICAL MEMOIR OF THE WAR IN WEST FLORIDA AND LOUISIANA* 134-35 (Gene A. Smith ed., The Historical New Orleans Collection 1999) (1816).

²⁹ Agreement for Exchange of Prisoners signed "Edw. Livingston, H.G. Smith, and Andrew Jackson," (Jan. 17, 1815), 3 *THE PAPERS OF ANDREW JACKSON*, *supra* note 25, at 247-48; see also LATOUR, *supra* note 28, at app. lxvi (discussing an exchange between Jackson and British commanders).

³⁰ Letter from General John Lambert to Major General Jackson (Feb. 8, 1815), in LATOUR, *supra* note 28, at 260 (Gene A. Smith ed., The Historical New Orleans Collection 1999).

brought upon himself by asking for his sword's return and was happy to oblige.³¹

Thus, with the matters of the prisoners of war, the escaped slaves, and the return of General Keane's sword to attend to, General Jackson sent a delegation of three particularly trusted members of the American command to the British fleet on February 4. The three men General Jackson sent—Messrs. Livingston, White, and Shepherd—are the three men mentioned by name in Chief Justice Marshall's opinion.

C. The American Delegation

1. Edward Livingston

Edward Livingston was General Jackson's aide-de-camp at the time Jackson selected him to serve as an envoy to the British fleet.³² As such, he was arguably the second most powerful person in New Orleans after only Jackson himself, and had been since his appointment to that position shortly after Jackson's arrival in the port city. Indeed, Livingston was instrumental in helping Jackson navigate one of the first challenges he faced upon taking command of New Orleans, which was to determine an appropriate response to an offer of assistance from the band of pirates that trolled the coastal waters and facilitated much of the limited shipping that eluded the British blockade. While Jackson despised the pirates, once describing them as "hellish Banditti," he also needed the manpower, artillery, ammunition and intimate knowledge of the terrain that they offered. It was

³¹ Jackson writing to his brother-in-law: "[W]hen a British Genl makes the request of an [A]merican Genl, to restore his *sword won in battle*—prospects of peace is [sic] opening to our View—and British pride much humbled . . ." Letter from Andrew Jackson to Robert Hays (Feb. 4, 1815), in 3 *THE PAPERS OF ANDREW JACKSON*, *supra* note 25, at 269. In a letter to the Secretary of War, Jackson was more restrained, saying that it was "more honourable to the American character to return it . . . than to retain it as a trophy of victory." Letter from Andrew Jackson to the Secretary of War (Feb. 17, 1815), in LATOUR, *supra* note 28, at 268.

³² ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767-1821*, at 249-50 (1977).

Livingston who, because of his long relationship with Jackson, convinced the General to accept the pirates' help.³³

On December 18, with the battle imminent, Jackson sought to inspire popular confidence and ordered a public review of the militia. After the review, Jackson asked Livingston to literally be his voice and deliver his rousing call to arms.³⁴ Throughout the preparation for and course of the battle, Livingston, commissioned as a colonel, remained one of Jackson's closest military advisors.³⁵ Jackson sent Livingston to negotiate the initial exchange of prisoners with the British on January 17, 1815,³⁶ and again it was Livingston who Jackson turned to at the beginning of February to help resolve the remaining matters with the British. Livingston, in short, was the quintessential insider.

The power enjoyed by Livingston was, in part, attributable to his long history with Jackson before either had ever set foot in Louisiana. Edward Livingston's public life intermingled with Andrew Jackson's beginning in the 1790s when they served together as members of the United States House of Representatives—Livingston as a Representative for his native New York, and Jackson for Tennessee.³⁷ The two were early opponents of the Jay Treaty with Britain and were among the handful of members who voted against Congress's formal reply to President Washington's farewell address, thinking it too effusive in its praise of the President.³⁸ Jackson biographer Robert V.

³³ Gene A. Smith, *Introduction* to LATOUR, *supra* note 28, at xxxiii. This episode in itself is illustrative of the frequency with which "insider" status was exploited for personal profit. See discussion *infra* Part IV. Livingston was *hired* by the pirates as an attorney (for a \$20,000 fee) to secure their acquittal from charges of violating trade laws. He advised them to offer to help the American cause and is thus credited by some for also bringing about their "transition from piracy to Patriotism." HICKEY, *supra* note 22, at 207. Furthermore, Judge Dominick A. Hall, the federal district court judge who presided over the *Laidlaw* trial, granted Lafitte—the pirates' leader—free passage so that he could personally make his case to Jackson and later issued the order to release imprisoned pirates on the condition that they enlist in the defense of the city. ROBERT V. REMINI, *THE BATTLE OF NEW ORLEANS* 46-49 (1999).

³⁴ REMINI, *supra* note 32, at 258-59.

³⁵ *Id.* at 274.

³⁶ Agreement for Exchange of Prisoners (Jan. 17, 1815), in 3 *THE PAPERS OF ANDREW JACKSON*, *supra* note 25, at 247-48.

³⁷ See REMINI, *supra* note 32, at 92, 249.

³⁸ *Id.* at 92-93; JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON: SPECIAL EDITION FOR SCHOOLS* 434-35 (Robert Faulkner & Paul Carrese, eds., Liberty Fund 2000) (1838).

Remini wrote that their votes “took courage and independence, even if [they] showed a lack of courtesy and judgment.”³⁹ After Livingston left Congress, he was appointed the U.S. Attorney for New York and then elected New York City’s mayor. His term was cut short in 1803, however, because of a scandal over misappropriation of public funds, though he denied responsibility because he had been sick with a bout of yellow fever. Soon thereafter, Livingston moved to New Orleans where he quickly established himself as a community leader and opened a successful law practice.⁴⁰

Still, Jackson understandably turned to Livingston to lead the delegation to negotiate on his behalf, since he had relied so heavily on Livingston during the battle, and because he had known and trusted Livingston for over two decades.

2. Maunsel White

Maunsel White, a captain of the Louisiana Volunteers, was the second member of the delegation. Only thirty-four years old in 1815, White was included primarily because the slave-owning plantation owners trusted him to represent their interests in regards to the escaped slaves.⁴¹ While the record is not entirely clear, it appears that White requested the opportunity to accompany Livingston to the fleet for the specific purpose of collecting the slaves. Regardless of whether he asked to go or was ordered, he was only included in the delegation because Jackson granted him permission and sent him to the fleet under orders.⁴²

³⁹ REMINI, *supra* note 32, at 93.

⁴⁰ See EDWIN BROCKHOLST LIVINGSTON, *THE LIVINGSTONS OF LIVINGSTON MANOR* 404-08 (1910).

⁴¹ Letter from William C. C. Claiborne to Andrew Jackson, in 3 *THE PAPERS OF ANDREW JACKSON*, *supra* note 25, at 268 n.10. After the War, White would go on to become one of the largest plantation owners in Louisiana, serve as Jackson’s cotton agent in New Orleans for nearly twenty years, and be elected a State Senator. 4 JOHN N. INGHAM, *BIOGRAPHICAL DICTIONARY OF AMERICAN BUSINESS LEADERS 1606* (1983).

⁴² Letter from Andrew Jackson to Robert Hays (Feb. 4, 1815), in 3 *THE PAPERS OF ANDREW JACKSON*, *supra* note 25, at 269; see also Letter from Andrew Jackson to Admiral Cochrane (Feb. 19, 1815), in LATOUR, *supra* note 28, at 262.

3. R. D. Shepherd

Accompanying Livingston and White was R. D. Shepherd. Shepherd was aide-de-camp to Daniel Patterson, the Navy Commodore who commanded the naval defense of New Orleans. Though the record on Shepherd is rather scant, there is a mention of him in a letter Patterson sent to the Secretary of the Navy—according to Patterson, upon sighting enemy movements of significant strategic importance during the battle, he sent Shepherd to convey the information directly to Jackson.⁴³ There is no documentary evidence on Shepherd's specific role in the delegation, but it is a fair assumption that he was sent along to represent naval interests—many of the American prisoners remaining in British custody were sailors who had been captured in a series of naval skirmishes in December.⁴⁴ The delegation sent to the British fleet by Jackson, in short, was composed of select, particularly trusted, well-connected individuals.

D. Livingston, White, and Shepherd Go to the British Fleet

Livingston, White, and Shepherd set out together on February 4, 1815, for the British headquarters which, by this point, had moved some 120 miles west of New Orleans to the Dauphine Islands at the mouth of Mobile Bay. The trio arrived after several days of travel, just in time to see the American position at Fort Boyer surrender to the numerically superior British.⁴⁵ The delegation successfully negotiated the exchange of prisoners and reunited the misty-eyed General Keane with his sword, though White, it seems, was unable to secure the return of the slaves.⁴⁶

⁴³ See Letter from Commodore Patterson to the Sec'y of the Navy (Jan. 13, 1815), in LATOUR, *supra* note 28, at 243; see also REMINI, *supra* note 32, at 273-74.

⁴⁴ See REMINI, *supra* note 33, at 166, 177.

⁴⁵ LATOUR, *supra* note 28, at 144.

⁴⁶ At the end of March, Jackson had to send another delegation to convince slaves to return to bondage because the British continued to refuse to return them without their consent. See Letter from Andrew Jackson to Major Gen. Lambert (Mar. 7, 1815), in LATOUR, *supra* note 28, at 273; Letter from Gen. Lambert to Major Woodruff (Mar. 20, 1815), in LATOUR, *supra* note 28, at 273.

Of central significance to the dispute in *Laidlaw*, however, was the arrival of a bulletin from Britain announcing the signing of the treaty ending the War while Livingston, White, and Shepherd were with the British.⁴⁷ While the official copy of the treaty arrived in Washington on February 11 and was ratified on February 17, over-land travel in this period was still significantly slower than sea travel. Moreover, because of the British blockade, the Americans did not have access to the latter and the British were thus the first in the Gulf region to learn of the treaty. Upon hearing the news on February 13, British Admiral Cochrane scribbled an addendum to a letter he had written to Jackson the day before, telling the American commander of the bulletin and offering his "sincere congratulations."⁴⁸ Livingston intended to bring this letter back to Jackson when he returned to New Orleans, but the note was somehow misplaced and did not reach Jackson until February 21.⁴⁹

Nonetheless, Livingston and the rest of the delegation brought the surprising news of the treaty back to New Orleans when they returned on the night of February 18. The record in *Laidlaw* shows that Shepherd told the news of the treaty to his brother, who had a one-third interest in the deal that Organ was negotiating, the night of his return. The news of the treaty did not become publicly available until eight o'clock the following morning, when White saw to the publication of a handbill announcing the news.⁵⁰ Consequently, Organ had the information only because of his business partner's brother, who was privy to information only by virtue of his special position in the military leadership.

⁴⁷ See Letter from Admiral Cochrane to Andrew Jackson (Feb. 13, 1815), in LATOUR, *supra* note 28, at 261.

⁴⁸ *Id.*

⁴⁹ Letter from Andrew Jackson to Admiral Cochrane (Feb. 21, 1815), in LATOUR, *supra* note 28, at 263.

⁵⁰ *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 183 (1817). Also on February 19, Jackson issued a statement to the "Soldiers and Citizens at New Orleans" where he acknowledged the report of the treaty, but also cautioned: "We must not be thrown into false security by hopes that may be delusive. It is by holding out such that an artful and insidious enemy too often seeks to accomplish what the utmost exertions of his strength will not enable him to effect." LATOUR, *supra* note 28, at 266. This may or may not be the same statement referred to in the record. Either way, it is clear that the information had arrived.

E. Continued Martial Law Over New Orleans

The privileged nature of the information regarding the treaty is further illustrated by the near-absolute control of the military leadership over New Orleans during this period. In the middle of December, 1814, Jackson had imposed martial law over New Orleans, requiring every individual entering the city to report to military authorities, forbidding anyone from leaving without military approval, and strictly limiting maritime traffic. Jackson additionally imposed a curfew at nine at night and ordered persons in violation to be "apprehended as spies and held for examination."⁵¹ Jackson refused to waver in enforcement of martial law until after he received official notice of the treaty.

Jackson took his declaration of martial law quite seriously. The day before declaring martial law, Jackson's headquarters issued a statement promising to "rigidly . . . execute the martial law" should he declare it.⁵² The statement concluded with the ominous promise that, should the general's orders not be obeyed, "he will separate our enemies from our friends. Those who are not for us are against us, and will be dealt with accordingly."⁵³

Jackson further demonstrated his resolve shortly after the battle when some local creoles began registering themselves as French citizens with the French consul in an effort to be discharged from militia service because of their "foreign nationality."⁵⁴ In response, Jackson, never one to take half-measures, expelled all the French subjects from the city and sent them away from the coast "not short of Baton Rouge"⁵⁵ for the duration of the conflict.⁵⁶

The extremes to which Jackson was willing to go were further demonstrated when a Louisiana state senator named Louis

⁵¹ General Orders to New Orleans Citizens (Dec. 16, 1814), in 3 THE PAPERS OF ANDREW JACKSON, *supra* note 25, at 207.

⁵² General Orders to New Orleans Citizens and Soldiers (Dec. 15, 1814), in 3 THE PAPERS OF ANDREW JACKSON, *supra* note 25, at 205.

⁵³ *Id.*

⁵⁴ REMINI, *supra* note 32, at 309.

⁵⁵ Order to the French Citizens of New Orleans (Feb. 28, 1815), in 3 THE PAPERS OF ANDREW JACKSON, *supra* note 25, at 294.

⁵⁶ REMINI, *supra* note 32, at 309.

Louaillier published an anonymous letter in a French-language newspaper criticizing the General for the expulsion and for maintaining martial law after the battle had been won and official notice of the treaty seemed imminent.⁵⁷ Jackson took this as an unpatriotic challenge to his authority and became enraged.⁵⁸ He personally interrogated the editor of the newspaper to discover the author of the article and then had Louaillier taken into custody.⁵⁹ As he was being led away by Jackson's troops, Louaillier engaged an attorney, Pierre Louis Morel, with a shouted exchange across a crowded square.⁶⁰

Morel promptly went to Judge Dominick Hall—the same federal district court judge who had presided over the trial in *Laidlaw*—and requested that a writ of habeas corpus be issued to bring Louaillier before the court for a hearing.⁶¹ Judge Hall granted the motion and set the hearing for the following morning at eleven o'clock.⁶²

Jackson, however, believed a “conspiracy” existed to undermine his authority, and that a “mutiny” was beginning to form within the city even as “[t]he enemy is still on our coast and near us” and “[h]is Agents and spies are within the city.”⁶³ In response to Hall's writ, Jackson ordered Hall himself arrested for “aiding abetting and exciting mutiny within my camp.”⁶⁴ Thus, as Louaillier described it, “[a]t the hour when I was to appear before [Judge Hall's] tribunal, I saw the judge come towards me to share my imprisonment in the same room.”⁶⁵

With Judge Hall as his cellmate, Louaillier appeared before a court-martial on charges of being a “spy, Illegal & improper

⁵⁷ *Id.* at 310.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Letter from Pierre Louis Morel to Dominick Augustine Hall (Mar. 5, 1815) in 3 THE PAPERS OF ANDREW JACKSON, *supra* note 25, at 299.

⁶³ Letter from Andrew Jackson to Thomas Beale (Mar. 6, 1815) in 3 THE PAPERS OF ANDREW JACKSON, *supra* note 25, at 301.

⁶⁴ REMINI, *supra* note 32, at 310 (quoting Letter from Andrew Jackson to Arbuckle (Mar. 5, 1815)).

⁶⁵ LOUIS LOUAILLIER, THE APPEAL OF L. LOUAILLIER, SEN. AGAINST THE CHARGE OF HIGH TREASON, AND EXPLAINING THE TRANSACTION AT NEW-ORLEANS 7 (n.p. 1827).

conduct & disobedience of orders, writing a willful & corrupt Libel against the Com[mandin]g general, unsoldierly conduct, & conduct unadmissible within the city of New Orleans & its environs under an order of the Com[mandin]g genl. dated [blank] day of Decr. 1814.”⁶⁶ Though Louaillier chose not to speak at his trial out of protest at not being afforded his Seventh Amendment right to a trial by jury, the tribunal acquitted him on each count for either procedural or substantive reasons. Because the city remained under martial law and Jackson was functionally unconstrained in his authority, the General simply decided to continue Louaillier’s detention despite his acquittal. Realizing that he would be similarly unable to secure a conviction against Judge Hall, Jackson had Judge Hall deposited four miles from the city by a small detachment of troops and ordered him not to return until the conflict’s end.⁶⁷

After Jackson received official notice of the treaty and lifted martial law from New Orleans, Judge Hall, back from exile and once again seated at his bench, ordered Jackson to appear to answer charges of contempt of court. Jackson used the trial to explain his actions in terms of necessity, not legal justification, and immediately paid the \$1000 fine imposed by Hall.⁶⁸

Andrew Jackson, in short, took his duty to defend New Orleans extremely seriously, perhaps to a fault. Travel to the British fleet was not a realistic option for enterprising but non-connected commodities traders hoping to get a competitive edge on the market by learning first-hand of any changes in the blockade. By virtue of their official positions, Livingston, White, and Shepherd had a monopoly on the news of the lifting of the British blockade.

III. LAIDLAW IN THE LITERATURE

The facts of *Laidlaw*, in short, are quite different than legal scholars have understood them to be. This is principally impor-

⁶⁶ Opinion on Verdict of Court-Martial of Louis Louaillier (Mar. 11-14, 1815), in 3 THE PAPERS OF ANDREW JACKSON, *supra* note 25, at 305-06.

⁶⁷ REMINI, *supra* note 32, at 312.

⁶⁸ Submission to the United States District Court, Louisiana (Mar. 27, 1815) in 3 THE PAPERS OF ANDREW JACKSON, *supra* note 25, at 322-34.

tant because the case is frequently cited by legal commentators attempting to untangle the convoluted and often contradictory series of cases that address when one party to a business transaction is obliged to share information with the other. While I have not found any scholarly legal writing that recognizes Livingston, White, and Shepherd's true business with the British fleet, the use of *Laidlaw* in the "law and economics" literature and the judicial decisions that follow demonstrate particularly clearly the confusion that can result from failing to understand the facts of a case.

A. Anthony Kronman and "Law and Economics"

The first use of *Laidlaw* in the "law and economics" literature is Anthony Kronman's seminal *Mistake, Disclosure, Information, and the Law of Contracts*.⁶⁹ The article is one of the foundational works in the law and economics canon on contract law, if not the law and economics canon at large.⁷⁰ Kronman's article has been widely cited in both journal articles⁷¹ and judicial opinions.⁷² Indeed, *Mistake, Disclosure, Information, and the Law of Contracts* is so central to the scholarly discourse on common law disclosure that essentially every subsequent work on the subject discusses it, often in depth.

Kronman applies law and economics analysis in his article to reconcile two lines of cases, one of which finds contracting parties obligated to disclose pertinent information and the other which finds no such duty even though all the cases share very similar facts. Using *Laidlaw* as the basis for the latter line of cases, Kronman arrives at a theory reconciling the disparate outcomes based upon whether or not the pertinent information at issue is the product of a deliberate search.⁷³

⁶⁹ Kronman, *supra* note 8.

⁷⁰ The theory of law and economics, as Richard Posner explains it, "is that the common law is best (not perfectly) explained as a system for maximizing the wealth of society." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 27 (5th ed. 1998).

⁷¹ A Westlaw search showed Kronman's article has been cited in 253 articles. Additionally, Fred R. Shapiro includes Kronman in a list of highly cited scholars with citation totals between 1000 and 1500. Fred. R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 425 (2000).

⁷² A Westlaw search shows that nine judicial opinions cite Kronman's article.

⁷³ Kronman, *supra* note 8, at 9.

Kronman's argument centers on economic efficiency and social usefulness. "From a social point of view," Kronman writes, "it is desirable that information which reveals a change in circumstances affecting the relative value of commodities reach the market as quickly as possible (or put differently, that the time between the change itself and its comprehension and assessment be minimized)."⁷⁴ With the benefit of such information, farmers, for example, may be able to readjust their planting so as to maximize the use of their land to the benefit of both the individual farmer and society as a whole. The sooner the farmer learns the information, the less likely the readjustment will incur additional costs such as uprooting an already planted crop and substituting it with another.⁷⁵ So, on one hand, Kronman believes the wide dissemination of information is socially useful.

On the other hand, however, Kronman is concerned with encouraging the discovery of the information that is valuable to the market. In some cases, valuable information is only acquired as a result of a deliberate search, such as when a securities analyst concertedly applies her expertise to study a corporation. In contrast to a businessman who learns a "valuable piece of information when he accidentally overhears a conversation on a bus,"⁷⁶ the securities analyst who deliberately acquires information only discovers the valuable information as a result of "costs which would not have been incurred but for the likelihood, however great, that the information in question would actually be produced."⁷⁷ Because society is ultimately enriched by the acquisition of the information that would not be discovered but for a deliberate search, Kronman argues that courts treat deliberately acquired information differently than casually acquired information to incentivize information seekers to expend resources searching for such information.⁷⁸

⁷⁴ *Id.* at 12.

⁷⁵ *Id.*

⁷⁶ *Id.* at 13.

⁷⁷ *Id.* These costs may include both direct search costs as well as the costs of developing expertise. *Id.*

⁷⁸ *Id.* at 13-14.

In Kronman's formulation, courts require disclosure when information is "casually" acquired, thereby allowing market participants to avoid costly mistakes without discouraging the active search for economically valuable information. The casual acquirer of valuable information did not seek it out and would have been as likely to discover the information had he been able to profit from it as not. When, in contrast, information is the product of a deliberate search, recognizing a property right by legally sanctioning nondisclosure is "the only effective way of providing an incentive to invest in the production of such knowledge."⁷⁹

Though Kronman uses *Laidlaw* as the starting point for his argument, he concedes that, from the record, he cannot be certain "whether the buyer in *Laidlaw* casually acquired his information or made a deliberate investment in seeking it out (for example, by cultivating a network of valuable commercial 'friendships')."⁸⁰ For an argument that purports to explain the development of law based on factual distinctions, this would seem to be a significant obstacle. Kronman side-steps his factual uncertainty by arguing that, because a case-by-case application based on factual issues would be prohibitively costly, courts might "apply a blanket rule (of disclosure or nondisclosure) across each class of cases involving the same sort of information."⁸¹ Though Kronman believes the ambiguity of *Laidlaw*'s facts, as presented in the record, "illustrates this point nicely,"⁸² as we have seen, the facts of *Laidlaw* belie his argument.

While Kronman demonstrates an understandable desire to limit his inquiry to the record that Chief Justice Marshall considered and saw relevant to cite in the opinion, he fails to consider that Chief Justice Marshall was writing for a relatively small community of educated elites who shared his familiarity

⁷⁹ *Id.* at 9.

⁸⁰ *Id.* at 15.

⁸¹ *Id.* at 17. Kim Lane Scheppele also points out the internal inconsistency of Kronman's use of "sketchy evidence." SCHEPPELE, *supra* note 9, at 34-35. Scheppele's criticism, however, focuses not on whether the casually/deliberately acquired dichotomy is the correct question, but instead on whether Kronman's economic analysis gives appropriate weight to the "inefficient consequences that follow individual decisions made without critical information." *Id.*

⁸² Kronman, *supra* note 8, at 17.

with the prominent members of their society.⁸³ Just because Chief Justice Marshall did not take the time to explicitly set out in his opinion an explanation of who Messrs. Livingston, White and, Shepherd were does not mean that he did not expect his readers to understand when he mentioned their names.

Edward Livingston in particular was very well known, both because of the prominence of his family and his own notoriety. His family's place in the ruling class in America stretched back four generations to Edward's great-grandfather Robert Livingston the Elder, a colonial official in New York.⁸⁴ Edward's older brother Robert was a drafter of the United States Constitution and negotiated the Louisiana Purchase as President Jefferson's envoy to France.⁸⁵ Furthermore, Edward was related through marriage to both Secretary of War John Armstrong and Major General Morgan Lewis (one of the four generals appointed by the president at the start of the War of 1812).⁸⁶ His cousin, Henry Brockholst Livingston, served with Marshall on the Supreme Court and frequently joined him in decisions.⁸⁷

Edward himself held a series of leadership positions in government that established him as a distinguished citizen in his own right. By the time of the Battle of New Orleans, Livingston had served as a representative of New York in the United States House of Representatives, the U.S. Attorney for the district of New York, and the mayor of New York City. After the War of 1812, he would return to the House as a congressman from Louisiana, represent the state for a few years in the Senate, and then serve as President Jackson's Secretary of State.⁸⁸

Livingston's moving-about among the ruling elite of the young American republic brought him into close and repeated contact with John Marshall. Upon landing in New York after

⁸³ See LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 29-40 (2009); see also GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1798-1815*, at 472 (2009).

⁸⁴ See LIVINGSTON, *supra* note 40, at 57.

⁸⁵ JAMES PARTON, 1 *THE LIFE AND TIMES OF AARON BURR* 169 (New York, Houghton, Mifflin, & Co. 1893); LIVINGSTON, *supra* note 40, at 353-81.

⁸⁶ JOHN K. MAHON, *THE WAR OF 1812*, at 103 (1972); REMINI, *supra* note 32, at 125.

⁸⁷ JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 350, 417-18 (1996).

⁸⁸ LIVINGSTON, *supra* note 40, at 394, 398, 403-04.

serving as one of President Adams' Commissioners to France in 1798 during the XYZ Affair, Marshall shared his coach to Philadelphia with Edward Livingston, who was then serving in Congress as a representative from New York.⁸⁹ Two years later, Livingston introduced a motion to censure President Adams for extraditing Jonathan Robbins, a man accused of committing murder on a British frigate who had escaped to South Carolina and falsely claimed American citizenship, to England. John Marshall was one of Livingston's chief opponents.⁹⁰

A decade later, Livingston, soon after moving to New Orleans, got in a tussle with the Jefferson administration over the purchase of some land. Livingston brought suit against Jefferson after he left office and Chief Justice Marshall, sitting as a circuit judge, heard the case.⁹¹ Indeed, in his biography of George Washington, Marshall mentions Livingston by name when recounting congressional debate over the Jay Treaty.⁹² The length and breadth of Marshall's interactions with Livingston leave little doubt that the Chief Justice knew who Livingston was when *Laidlaw* came before his court, and Livingston's national prominence leaves little doubt that Marshall expected his readers would know as well.

Kronman misses a key fact that Chief Justice Marshall took for granted. Because the trio of Messrs. Livingston, White, and Shepherd are mentioned by name, it is reasonable to assume that Marshall understood the nature of their business with the British fleet or, at the very least, recognized the possibility that they were on official business. But because 160 years later the names are not commonly known, Kronman parenthetically con-

⁸⁹ SMITH, *supra* note 87, at 235. See also Letter from John Marshall to Timothy Pickering (June 18, 1798), in 3 THE PAPERS OF JOHN MARSHALL 467 (Charles T. Cullen, ed. 1979); Letter from Thomas Jefferson to James Madison (June 21, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON 416 (Barbara B. Oberg ed., 2003). For a description of the "XYZ Affair", see WOOD, *supra* note 83, at 241-43.

⁹⁰ R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 135-137 (2001).

⁹¹ *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411). Further illustrating the interconnectedness of the ruling elite in the early Federal Republic, Marshall sat with District Judge John Tyler, father of the tenth President (the latter half of "Tippecanoe and Tyler Too"). *Id.* at 661.

⁹² See *supra* note 38 and accompanying text.

cludes, "What Shepherd's brother and his companions were doing with the British Fleet is not disclosed."⁹³

By failing to grasp what would almost certainly have been apparent to Marshall, Kronman presents a false dichotomy by discussing whether the news of the end of the British blockade was casually or deliberately acquired. Given that the delegation learned about the end of the blockade only because it was able to leave the city and get to the British fleet on official business, it would have been impossible for a non-insider party to have gained access to the information at all, regardless of how deliberate the effort.

My purpose here is not to challenge Kronman's broader argument about casually/deliberately acquired information, but rather his use of *Laidlaw* as support for it. By taking the incomplete facts set out in Marshall's opinion and making unsupported factual assumptions, Kronman ascribes an implicit rationale to the Chief Justice that is incompatible with the fuller picture of the actual facts as Marshall understood them. In essence, Kronman has taken a normative argument and couched it as a positive interpretation of law as it exists.

Since the publication of *Mistake, Disclosure, Information, and the Law of Contracts* in 1978, several judges have not only adopted Kronman's reasoning, but cited *Laidlaw* along with the article in support of it. In *United States v. Dial*, Judge Richard Posner cites Kronman's article and *Laidlaw* as a pair to support the proposition that "[l]iability is narrower for nondisclosure than for active misrepresentation, since the former sometimes serves a social purpose."⁹⁴ Similar language appears as a recurring trope in cases dealing with questions of disclosure in contract.⁹⁵ In *Emerald Investments Ltd. Partnership v. Allmerica*

⁹³ Kronman, *supra* note 8, at 10.

⁹⁴ *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985). It should be noted, also, that Judge Posner and Professor Kronman have enjoyed a long professional relationship which has included co-authoring a book. See Anthony T. Kronman & Richard A. Posner, *The Economics of Contract Law* (1979).

⁹⁵ See *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 580 (7th Cir. 2004) (Judge Posner, holding that two former employees had no legal duty to disclose valuable information when negotiating for a release from tort liability, wrote: "unless they were fiduciaries, they had no legal duty to disclose damaging information merely because it would be valuable to the person on the other side of the negotiation. That is about as

Financial Life Insurance & Annuity Co., for example, Judge Posner drops the citation to Kronman's article.⁹⁶ Instead, he cites *Laidlaw* as the "govern[ing]" case for the proposition that "[a] buyer is not required to disclose the profit he anticipates from dealing with the seller" because "such a requirement would kill the incentive to seek out profit opportunities."⁹⁷ By citing *Laidlaw* for Kronman's argument, Judge Posner has gilded it with the precedential blessing of Chief Justice Marshall.

B. Kim Lane Scheppele

Kronman, of course, is not the only voice in the debate about the common law duty of disclosure. One of his most prominent critics has been Kim Lane Scheppele, who, in her book *Legal Secrets: Equality and Efficiency in the Common Law*,⁹⁸ forcefully argues against Kronman's casually/deliberately acquired information dichotomy.⁹⁹ Scheppele posits that courts base their determination of whether valuable information should be disclosed on the degree to which both parties had equal access to the information.¹⁰⁰ Like Kronman, Scheppele uses *Laidlaw* as one of the paradigmatic examples at the center of her argument. Yet her statement of *Laidlaw*'s facts is, if anything, more misleading than Kronman's. While Kronman acknowledges that he does not know anything about Livingston, White, and Shepherd and then moves on, Scheppele affirmatively misstates the facts. In Scheppele's account, "Organ

fundamental a principle of commercial law as there is. People would have little incentive to hunt for bargains if they had to disclose to the seller the true value of the seller's property.") (citations omitted); *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991) ("The duty of honesty, of good faith even expansively conceived, is not a duty of candor. You can make a binding contract to purchase something you know your seller undervalues."); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 528 (7th Cir. 1985) ("Often the law imposes no obligation to disclose. Much information is commercially valuable, and people must hide this information to exploit its value. If they could not hide it, they would not have the right incentives to produce it. The law of trade secrets is based on this proposition, and there are many other instances in which information must be got at by investigation or not at all.") (citations omitted).

⁹⁶ 516 F.3d 612, 616 (7th Cir. 2008).

⁹⁷ *Id.*

⁹⁸ SCHEPPELE, *supra* note 9, at 7.

⁹⁹ *See id.* at 32-36.

¹⁰⁰ *Id.* at 7.

had heard the news [of the Treaty of Ghent] from three American merchants who happened to be sailing with the British fleet at the time that the fleet heard the news of the treaty."¹⁰¹

Setting aside the source of Scheppele's misunderstanding for a moment, it should by now be clear that Scheppele's version is factually inaccurate. Unlike Kronman, who analyzes *Laidlaw* more or less on its own, Scheppele pairs Marshall's opinion with *Strong v. Repide*,¹⁰² an opinion issued by the Supreme Court ninety-one years later, and uses the contrast between them as support for her argument that comparative access to information is at the core of the U.S. common law disclosure regime.¹⁰³

Strong v. Repide stems from a dispute between Repide, the chief shareholder, director, and general administrator of the Philippine Sugar Estates Development Company, and Strong, a former minority shareholder in that company.¹⁰⁴ The only valuable assets that the company held were large tracts of "Friar Lands," which the United States government was seeking to purchase in its new capacity as de facto government of the Philippines.¹⁰⁵ Because of his dominant position in the company, Repide served as the sole negotiator in secret talks with the U.S. Government for the sale of the land.¹⁰⁶ As a result of his unique position, he knew that the American government was likely to pay more than its initial offers for the land.¹⁰⁷

Repide also knew that the minority shareholders were eager to sell—they had voted to accept the initial offers made by the government, and it was only because he used his votes to block them that their will was thwarted.¹⁰⁸ His unique first-hand experience with the negotiations, combined with his knowledge of the other shareholders' willingness to sell, provided Repide with an easy, if unscrupulous, opportunity for profit.

¹⁰¹ *Id.*

¹⁰² 213 U.S. 419 (1909).

¹⁰³ SCHEPPELE, *supra* note 9, at 112-15.

¹⁰⁴ *Strong*, 213 U.S. at 421.

¹⁰⁵ *Id.* at 423-25.

¹⁰⁶ *Id.* at 432.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 424.

Through agents whose connection to him was hidden, Repide bought out the minority shareholders' interest in the company.¹⁰⁹ With all of the shares of the company in his control, Repide waited for what he believed to be the government's maximum price, which came a few months later, and then sold the Company's lands to the U.S. government.¹¹⁰ The value of the land had multiplied almost five-fold.¹¹¹

Upon learning what had happened, the minority shareholders were outraged. One such minority shareholder, Strong, had sold his 800 shares to one of Rapide's agents for \$16,000 which, after the sale of the lands, increased in value to \$76,256.¹¹² Strong was understandably displeased and sued Rapide.¹¹³ He claimed that he would not have sold his shares had Rapide not hidden his interest in purchasing them through the use of an agent.¹¹⁴ Rapide's interest, Strong argued, would have signaled that the value of the shares was about to increase.¹¹⁵

Even though *Strong* and *Laidlaw* are similar—both have someone “engaging in speculation resulting from actions of the U.S. government” and have buyers in the transaction who “withheld critical information about the impending change in value of the good exchanged from the seller”¹¹⁶—the Court in *Strong* held that Rapide *did* have a duty to disclose.¹¹⁷ Scheppele argues that, despite the similarities between the two cases, the courts were persuaded by the differences.¹¹⁸ “The critical difference in these two cases,” Scheppele writes, “was the two parties’ relative access to the information in question.”¹¹⁹ In Scheppele’s formulation, “[t]wo actors will be said to have equal access to information if they (1) have equal probabilities of find-

¹⁰⁹ *Id.* at 425.

¹¹⁰ *Id.* at 424.

¹¹¹ *Id.* at 422.

¹¹² *Id.*

¹¹³ *Id.* at 421.

¹¹⁴ *Id.* at 425.

¹¹⁵ *Id.*

¹¹⁶ SCHEPPELE, *supra* note 9, at 113.

¹¹⁷ *Strong*, 213 U.S. at 434.

¹¹⁸ SCHEPPELE, *supra* note 9, at 115.

¹¹⁹ *Id.* at 122.

ing the information if they put in the same level of effort and (2) are capable of making this equivalent level of effort.”¹²⁰

The obvious problem for Scheppele’s argument is that the facts of *Laidlaw* as we now understand them do not fit into this definition of equal access at all. No matter how much effort or how many resources the warehouse company expended, the embargo enforced by the American military would most likely have prevented any of Laidlaw’s agents from having been at the British fleet and thus positioned to gain timely information about the treaty.

While Scheppele’s misunderstanding of the facts of *Laidlaw* is materially the same as Kronman’s, her approach to understanding the facts of the case was quite different. When reading *Laidlaw*, Scheppele, unlike Kronman, was troubled by how “uncomfortably sketchy” Marshall’s opinion is in setting out the facts of the case and looked to a source beyond the opinion to fill in the gaps.¹²¹ Unfortunately, Scheppele’s chosen source, Guilian C. Verplanck’s *An Essay on the Doctrine of Contracts: Being an Inquiry How Contracts Are Affected in Law and Morals by Concealment, Error, or Inadequate Price*,¹²² is flat wrong. It is, however, easy to see why she was misled.

Verplanck wrote his essay in 1825 as a passionate response to Marshall’s *Laidlaw* decision. This would seem to be as accurate a place as any from which to glean a fuller understanding of *Laidlaw*’s facts—Verplanck, after all, was a contemporary of Marshall’s (not to mention of Livingston, White, and Shepherd), and his work is of enough enduring significance for the famed legal historian Morton Horwitz to describe it as having “brilliantly and systematically rethought” the basis of contract law.¹²³ Yet, Verplanck himself was unquestionably shady on the specific facts of *Laidlaw*. The first page of his essay, from which

¹²⁰ *Id.* at 120.

¹²¹ *Id.* at 6 n.6.

¹²² See VERPLANCK, *supra* note 10.

¹²³ HORWITZ, *supra* note 2, at 181. See also Hoeflich, *supra* note 19, at 66 (“Verplanck’s Essay and his attempt to define justice in terms of both morality and practicality is remarkably sophisticated; it foreshadowed debates that are even now taking place.”).

Scheppele derived her account of the case, describes “two or three American merchants who were accidentally on board.”¹²⁴

This is admittedly somewhat puzzling. Verplanck, like Livingston, was a native New Yorker and active in the political life of the city, serving in both the State Assembly and the United States House of Representatives.¹²⁵ Verplanck, if anything, was *less* likely than Marshall to have not recognized Livingston’s name and mistaken him for a merchant. Yet, even if Verplanck did not recognize Livingston’s name, this would still not explain Verplanck’s uncertainty about the number of individuals who obtained the information from the British fleet. Had Verplanck had access to the official reporter’s notes, he would need only have counted to three to know that there were definitively three, not “two or three” men with the British fleet. In all likelihood, Verplanck wrote his commentary without having seen the reporter’s notes, gathering the facts of the case from word-of-mouth or some other informal source.

This is not as improbable as it sounds. Even though Verplanck’s essay was published about eight years after *Laidlaw* was decided, the system of reporting cases in the United States was in its infancy. The official reporter’s commentary on *Laidlaw*, which includes the language from the district court decision that explicitly names Livingston, White, and Shepherd, was not at all widely available. Only between 1000 and 1500 copies of the reporter containing *Laidlaw* were published.¹²⁶ Verplanck not having access to the official reporter’s notes would explain not only why he mistakenly described the individuals with the British fleet as merchants, but also his uncertainty of how many there were.

This illustrates an important corollary to the argument set out above, that legal commentators should be more willing to look to external sources to better understand the facts of cases, especially those from early in United States legal history, and that those external sources should be accurate. Historical

¹²⁴ VERPLANCK, *supra* note 10, at 1.

¹²⁵ CHARLES P. DALY, GULIAN C. VERPLANCK: HIS ANCESTRY, LIFE, AND CHARACTER 16, 48 (New York, D. Appleton & Co. 1870).

¹²⁶ FREDERICK C. HICKS, MEN AND BOOKS FAMOUS IN THE LAW 201 (1921).

sources should be approached with a healthy amount of skepticism and every effort should be made to verify them with other sources. The fact that a source is old does not necessarily mean its contents are incontrovertible historical fact.

IV. BROADER IMPLICATIONS OF THE MISUNDERSTANDING OF *Laidlaw*

Marshall's approach to *Laidlaw* demonstrates the degree to which the law and society of Marshall's time differed from ours with respect to its toleration of "insiders"—individuals privy to information or privileges not generally available—profiting from their status. There is a good deal of work by historians, particularly in the areas of banking, bankruptcy, and the distribution of public lands, showing a broad toleration for "insider" activities in the United States during the period in which Chief Justice Marshall wrote *Laidlaw*. This scholarship shows that Marshall's toleration of the "insider" in *Laidlaw* profiting from his status was consistent with a broader social and legal view towards the subject in antebellum America.

A. Insider Lending

Economic Historian Naomi Lamoreaux has argued that banks in antebellum America frequently engaged in "insider lending," with the records of some banks showing that as much as seventy-five to eighty percent (by value) of their total loans were directed to bank directors and their families.¹²⁷ Though early banks were created as legal entities akin to the form of publicly-oriented municipalities along the lines of turnpike and bridge corporations,¹²⁸ Lamoreaux argues that this legal structure belied their fundamental purpose.¹²⁹ Banks existed primar-

¹²⁷ NAOMI LAMOREAUX, INSIDER LENDING: BANKS, PERSONAL CONNECTIONS, AND ECONOMIC DEVELOPMENT IN INDUSTRIAL NEW ENGLAND 12 (1994) [hereinafter LAMOREAUX, INSIDER LENDING]. See also Naomi Lamoreaux, *Banks, Kinship, and Economic Development: The New England Case*, 46 J. ECON. HIST. 647 (1986) [hereinafter Lamoreaux, *Banks*].

¹²⁸ HORWITZ, *supra* note 2, at 111-12.

¹²⁹ See generally, LAMOREAUX, INSIDER LENDING, *supra* note 127; Lamoreaux, *Banks*, *supra* note 127.

ily to pool resources in the community to allow the directors and their kin to undertake business ventures that would otherwise have been impossible given their limited resources.

Some bank directors, motivated by concern with the prudence of their institutions' lending practices, attempted to limit the amount of money that could be borrowed by any one individual or firm and prohibited renewals of notes, though these efforts tended to fall flat.¹³⁰ These reform efforts, however, were not motivated by an abstract concern over breaching the public trust, but rather over the practical concern that failure to recoup some of the larger loans would have a detrimental, perhaps disastrous, effect on the bank's financial stability.¹³¹

Lamoreaux argues that, although insider lending was not without its critics, there was a generally "blasé" attitude towards the practice.¹³² Lamoreaux cites as an example the collapse of the Farmers and Mechanics Bank in Pawtucket in 1829.¹³³ It was apparently well-known that the bank's failure was caused by the financial ruin of the family that dominated the bank's board of directors and was also deeply indebted to the bank. Though the legislature investigated the bank's failure and it was widely discussed in contemporary newspapers, no one commented on the fact that the family owed the bank in excess of \$150,000. "Had contemporaries viewed such insider lending as a breach of the public trust embodied in the bank's charter," Lamoreaux notes persuasively, "some comment to this effect would surely have found its way into the legislature's deliberations, the commission's reports, or contemporary newspaper accounts."¹³⁴

Lamoreaux, moreover, identifies numerous similar instances—in each case a bank failure more or less directly resulting from bad debts associated with insider lending and, in each, the investigating commissions and contemporary commentators regarded the basic financial strategy as either not worth men-

¹³⁰ LAMOREAUX, INSIDER LENDING, *supra* note 127, at 12.

¹³¹ See Lamoreaux, *Banking*, *supra* note 127, at 660-61.

¹³² LAMOREAUX, INSIDER LENDING, *supra* note 127, at 32.

¹³³ *Id.* at 31.

¹³⁴ *Id.* at 32.

tion or more or less inevitable.¹³⁵ The Rhode Island bank commissioner's report in 1837, for example, found that banks had become "mere engines to supply the directors with money."¹³⁶ Yet, the report saw this as not entirely objectionable because "[c]ertain it is, that at present, a person who is a director in one bank, can rarely obtain any accommodation at another."¹³⁷ It was not enough for bank directors to be "insiders" in the sense of being of the class that directed banks, their insider status was particular to their given institution—bank directors turned to their own institutions because, in 1837, that was the only bank from which they could hope to borrow money.

Lamoreaux offers two reasons why insider lending was not considered an abuse. The first is her central argument—"notwithstanding their corporate charters, banks did not operate primarily as public service institutions. Their main purpose was to serve as the financial arms of the extended kinship groups that dominated the economy."¹³⁸ Essentially, antebellum observers did not consider it inappropriate for banks to lend to insiders because it was for that very purpose that they were founded. The criticisms of insider lending practices come from those in society who believed that banks did, or at least should have had, a different function.

The second explanation is closely related to the first. The reliance of banks upon familial relationships provided a valuable source of information for lenders in the low-information environment of late-eighteenth and early-nineteenth century America. "Information systems were still primitive," Lamoreaux writes, "data about potential business dealings was difficult and costly to obtain, and people were not sure whom they could trust."¹³⁹ Robert A. Pollack, upon whose work Lamoreaux bases her kinship-enterprises argument, puts it quite succinctly: "Social contracts within the family provide information unavailable

¹³⁵ *Id.*

¹³⁶ LAMOREAUX, INSIDER LENDING, *supra* note 127, at 32-33 (quoting Rhode Island, Gen. Assembly, *Acts and Resolves* (January 1837), 89-92).

¹³⁷ *Id.*

¹³⁸ Lamoreaux, *Banks*, *supra* note 127, at 659.

¹³⁹ LAMOREAUX, INSIDER LENDING, *supra* note 127, at 26.

to outsiders.”¹⁴⁰ Family ties thus provided a means for bank directors to monitor each other’s activities and ensure loyalty. The knowledge of such monitoring, along with the strong reputation of the elite kinship networks, convinced “outside” depositors and stockholders to entrust their capital to those networks.

As economic expansion in the post-Civil War period transformed New England into a capital-rich economy, much of the rationale for allowing insider lending fell away.¹⁴¹ Furthermore, information-gathering systems such as the rise of credit reporting made the information provided by kinship networks less crucial—that is, displaced kinship networks as the sole source for such information.¹⁴² Thus, while the families that had always controlled the banks remained in control, there was a general decline in insider lending at the end of the nineteenth century.¹⁴³

Because early American banks were something of a hybrid between public and private institutions, they in themselves are not perfect analogues to the question presented by *Laidlaw*.¹⁴⁴ Unlike military officers who were part of a martial law regime governing an American city, members of bank boards of directors were, while technically obligated to the public by the bank charters, also private actors with socially acceptable private goals. Still, the banking system is illustrative of the social networks that closely bound elites in antebellum society, and Shepherd profiting from his position was not so different from the types of benefits insiders and elites drew from their status in many facets of the early federal republic.

¹⁴⁰ Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581, 586 (1985).

¹⁴¹ NAOMI LAMOREAUX, INSIDER LENDING, *supra* note 127, at 84.

¹⁴² For a discussion of the effect of credit reporting on the post-Civil War banking industry, see EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 146-181 (2001).

¹⁴³ NAOMI LAMOREAUX, INSIDER LENDING, *supra* note 127, at 84; see generally BALLEISEN, *supra* note 142.

¹⁴⁴ It should be noted that I am treating the information brought back from the British fleet by the three American military officials as a public resource. The news was published in a handbill just hours after the deal at issue in *Laidlaw v. Organ* was struck.

B. Bankruptcy

As with banking, the Bankruptcy system in antebellum America was distinguished by insiders who used their connections for personal gain. This case overcomes many of the problems with the banking example—while insider lending was considered acceptable in banks because they were, at least to some extent, private institutions, bankruptcy courts were unquestionably public institutions.

Legal Historian Edward Balleisen argues that there were two primary avenues by which insiders profited from the bankruptcy system.¹⁴⁵ Some insiders benefited by scoring appointments to lucrative positions within the system, which positioned them to earn significant fees.¹⁴⁶ Others were able to parlay information they learned from their proximity to the system into financial gain in liquidation sales.¹⁴⁷ As was the case with banking, this profiting from insider status did not go unnoticed by critics,¹⁴⁸ but it was by and large accepted as the norm.

Under the bankruptcy regime created by the 1841 Federal Bankruptcy Act signed into law by President John Tyler, and many of the local systems that both preceded and succeeded it, there were a bevy of private assignees and receivers who were paid to manage property that bankrupts surrendered to their case.¹⁴⁹ Sheriffs and auctioneers were compensated for carrying out court orders to foreclose or sell bankrupts' properties.¹⁵⁰ Clerks in the court system were sometimes paid generous fees for copying documents and doing other paperwork.¹⁵¹ Positions in the bankruptcy system, in short, could be quite lucrative and were often filled by insiders.

Though judges themselves did not directly profit from the fees and commissions generated by bankruptcy proceedings, they were indirect beneficiaries. Since appointment of most of the functionaries within the bankruptcy system was at their

¹⁴⁵ See BALLEISEN, *supra* note 142, at 18.

¹⁴⁶ See *id.* at 18, 139-40.

¹⁴⁷ *Id.* at 18, 157-58.

¹⁴⁸ *Id.* at 137.

¹⁴⁹ *Id.* at 135.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 138.

discretion, judges were able to build patronage networks. Balleisen cites numerous examples in which appointments were given as favors to “old friends” or more powerful judges, such as when a federal district court judge in Massachusetts appointed Supreme Court Justice Joseph Story’s son to serve as a bankruptcy commissioner in his district.¹⁵² In other cases, judges appointed their own relatives to lucrative court positions, as when Judge Betts in the Southern District of New York appointed his son Charles to serve as his clerk.¹⁵³ Moreover, because the presiding judge set the bankruptcy-related fees in any given jurisdiction, the judges controlled just how lucrative these appointments would be.¹⁵⁴

The second means by which insiders profited from the antebellum bankruptcy system is somewhat different in character from the first. The appointment of insiders to well-paid positions signifies that the best-qualified candidates were sometimes overlooked and, perhaps, that judges set the fees inappropriately high to the detriment of creditors and to the benefit of their appointed friends and kin—the benefit to insiders came from *whom* they knew. Under the second means, “insider” status made antebellum bankruptcy profitable by providing the opportunity for access to information which could be used during an estate’s liquidation—insiders benefited from *what* they knew.

The Bankruptcy Act of 1841 allowed debtors to enter bankruptcy and liquidate all but three hundred dollars worth of non-exempt goods, and the proceeds, if any remained after the costs of the bankruptcy itself, would be divided among their creditors.¹⁵⁵ A whole industry grew up around people who would professionally speculate on these goods, a practice known as “wrecking.”¹⁵⁶ Some goods that were sold in liquidation sales—furniture, jewelry, and textiles, for example—were of relatively

¹⁵² *Id.* at 139.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 138.

¹⁵⁵ *Id.* at 152. See Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843).

¹⁵⁶ BALLEISEN, *supra* note 142, at 136.

clear value to buyers, even without inside information.¹⁵⁷ It was not from such goods that the wreckers made their profits.

Much of the property surrendered by bankrupts to liquidation sales, however, was not so easily appraised. Real estate often constituted a large part of bankruptcy estates and was sometimes located hundreds of miles from the location of the auction, making first-hand inspection extremely costly.¹⁵⁸ Furthermore, land sold at liquidation sales was conveyed under a quitclaim deed, and purchasers were only transferred whatever land rights the bankrupt had.¹⁵⁹ Absent an expensive and time-consuming title search, an "outsider" had no way of knowing about encumbrances that might diminish the value of the land—knowledge that the bankrupt and, in some cases, his associates would already possess.

Similarly, valuation of the intangible assets that were often part of estates in bankruptcy proved extremely difficult to outsiders. As Balleisen notes, documentation of yet-to-be-collected debt in the form of an account book, promissory notes, or bills of exchange could be worth either several thousand dollars or—if the individuals or enterprises who owed these debts were insolvent, dead, or disappeared—nothing.¹⁶⁰ Likewise, corporate stock could represent equity in either a valuable enterprise or a failed venture whose assets had been mortgaged to the hilt.¹⁶¹

To be successful at wrecking, however, it was crucial to have access to low-cost information. In some cases, bankrupts themselves, who obviously knew more about their estate than anyone else, were able to successfully parlay their inside information into quite profitable purchases at liquidation.¹⁶² More often, however, the most successful wreckers were speculators who had access to information by virtue of their position inside the system. Though the methods used by wreckers to separate the wheat from the chaff are not entirely clear, the most suc-

¹⁵⁷ *Id.* at 152.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 152-53.

¹⁶⁰ *Id.* at 153.

¹⁶¹ *Id.*

¹⁶² *Id.* at 154.

cessful wreckers “enjoyed unparalleled access to information about the property of southern New York bankrupts.”¹⁶³

Balleisen tells of the two most active purchasers in the Southern District of New York. One was the secretary to the general assignee, whose office oversaw all bankruptcy estates in Manhattan and Brooklyn.¹⁶⁴ The other was one of the office’s appraisers.¹⁶⁵ By the mid-1850s, both men had become wealthy from their acumen. In short, speculators with information about the value of assets to be sold at liquidation that was not publicly available, and sometimes the debtors themselves, had the opportunity for “hugely successful speculations.”¹⁶⁶

As with banking, the profit reaped by insiders in the bankruptcy system was certainly not without criticism. The high fees that often went to the court appointees and lawyers were the subject of complaints, particularly from creditors.¹⁶⁷ The bankruptcy costs, while averaging as low as fifteen dollars in New Hampshire, could range into the hundreds of dollars for contested bankruptcies in some jurisdictions.¹⁶⁸ And, since the fees were paid from the bankrupts’ assets before they were distributed to creditors, sometimes leaving nothing for the creditors, it is understandable that criticisms were leveled at the bankruptcy system as a whole as being for the benefit of lawyers and the courts rather than creditors. Given that nearly everyone on the inside of the bankruptcy system—lawyers, court appointees, judges—benefited from the high fees, it is unsurprising that there is nothing to indicate any legal challenges to the system were ever lodged.

Criticisms of wrecking similarly questioned the public good of the practice writ large, rather than specifically attacking the wreckers *qua* insiders. Critics contrasted the “land pirates of trade,” who feasted on the carrion resulting from economic fail-

¹⁶³ *Id.* at 156.

¹⁶⁴ *Id.* at 139.

¹⁶⁵ *Id.* at 156.

¹⁶⁶ *Id.* at 152.

¹⁶⁷ *Id.* at 138.

¹⁶⁸ *Id.*

ure, with the Protestant ideal of "productive, socially useful callings" in agriculture, manufacturing, and trade.¹⁶⁹

C. Distribution of Public Lands

The Land Law of 1796 was Congress's first attempt to replace the haphazard scheme of public land distribution inherited from the colonial governments with a comprehensive administrative system.¹⁷⁰ As with banking and bankruptcy, though, the resulting arrangement was rife with opportunities for insiders to profit. It was marked most of all by strong connections between appointees charged with the administration of public lands and the land business.¹⁷¹ The federal government sought to appoint prominent citizens of the frontier territories to posts administering those territories' land offices because, as Malcolm Rohrbough notes, this reflected favorably on both the offices and the national government.¹⁷² Almost all of these men, however, were involved in land speculation themselves.¹⁷³ To some extent this was to be expected since the undeveloped frontier offered little else for men of means to invest in other than land. Yet, those appointed from the east also "acquired the habit of investment in the public lands soon after crossing the mountains."¹⁷⁴

Judges in the territories were similarly involved in land speculation. Rufus Putnam, the man who would go on to be appointed the Surveyor General of the Northwest Territory, for example, first served as both a judge and the chief representative of the Ohio Company of Associates in the Northwest Territory.¹⁷⁵

Furthermore, though not surprisingly, positions as land office officials were awarded, like positions in the bankruptcy sys-

¹⁶⁹ *Id.* at 159-60 (citation omitted).

¹⁷⁰ MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837*, at 20-21 (1968). *See* Act of May 18, 1796, 1 Stat. 464 (amended 1800).

¹⁷¹ ROHRBOUGH, *supra* note 170, at 20-21.

¹⁷² *Id.* at 21.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

tem, to political allies and friends. Those appointed to the highest posts were connected to the most powerful men in the early federal republic. Rohrbough lists a litany of appointees who were closely connected to those in the highest positions of power in the federal republic: John McLean, the Commissioner of the General Land was close friends with John C. Calhoun; John Coffee and Robert Butler, who served as Surveyors General, were close with Andrew Jackson, as were land officers Richard Keith Call, George Ward, and Samuel Overton; John J. Monroe, who was appointed a land inspector in Missouri and Arkansas, was President James Monroe's brother.¹⁷⁶ Appointees to less august positions were at the discretion of more senior appointed land office officials.¹⁷⁷ Thus, appointment provided not only the opportunity for personal profit in the form of fees and knowledge that could be put to use in the land market, but also the opportunity to create patronage networks like judges operating in the bankruptcy system.

In contrast to the 1841 Federal Bankruptcy Act, which granted judges the discretion to set fees in their jurisdiction, federal laws in the 1820s concerning the forfeiture of lands set fees for forfeitures—fees which were considered woefully inadequate.¹⁷⁸ To remedy this, some land officers attempted to charge the government an additional one percent commission for their work dealing with foreclosures, while another simply added five hundred dollars to his budget to pay for an assistant.¹⁷⁹ Though the Federal Comptroller rejected the charges, and while it took an act of Congress to eventually compensate the land officers for their additional work, even the belief among the land officers that such actions were acceptable demonstrates that some understood their offices as property.¹⁸⁰ Another way land office officials took advantage of their insider status was by selling valuable information about public lands to land speculators and using public money to finance banking schemes.¹⁸¹

¹⁷⁶ *Id.* at 192-93.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 153.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 230.

As with banking and bankruptcy, there were critics of the advantages that insiders were able to take from the system. Rohrbough comments that “[t]he close connection between administrators and the land business would continue into the nineteenth century and would often serve to cast doubt on the integrity and impartiality of the administration of the public lands.”¹⁸² Still, like banking and bankruptcy in antebellum America, the distribution of lands was marked by a generally permissive attitude towards insiders using the system for financial gain.

This permissive attitude towards insiders profiting from their privileged status in antebellum America helps explain why Chief Justice Marshall did not see *Shepherd*’s insider status as an issue worthy of mention. Rather than being seen as a thread in the tapestry of doctrine balancing the use of profit as a motive for economic activity and the protection of the public at large from being taken advantage of by insiders, *Laidlaw* is better understood as the product of an earlier epoch in American law when finding such a balance was not much of a concern for the courts.

CONCLUSION

This article has sought to show that, around the *Laidlaw* decision itself, were facts of which Chief Justice Marshall was almost certainly aware but chose not to include in the decision. These omitted facts are quite important to contemporary understanding of the decision’s meaning and scope. What a judge chooses to include in a judicial opinion is determined, in part, by his understanding of relevance to the question at hand. The relevance of certain facts can change as law develops over time, and it is important for legal scholars to keep this in mind as they engage historical cases. As Kronman and Scheppele’s uses of *Laidlaw* demonstrate, omissions can be an important window into judicial reasoning, and these can only be discovered by looking beyond the judicial opinion and the reporter’s summary.

¹⁸² *Id.* at 21-22.

More broadly, this article has sought to demonstrate the value of considering judicial opinions, particularly the terse opinions from early American history, not only for what they say, but also for what they do not. Perhaps one of the reasons *Laidlaw* is so frequently cited is because Chief Justice Marshall's opinion is so spare. With an opinion that does not say much beyond the rule, either in the way of the facts or rationale, commentators can use the opinion to support a wide variety of arguments.

Certainly, Professor Kronman's argument concerning disclosure has persuaded a good deal of the legal community independent of his reliance on *Laidlaw*. Yet, the facts that gave rise to the dispute in *Laidlaw* show that Chief Justice Marshall could not have been using Kronman's or Scheppele's logic in arriving at his decision, and thus, *Laidlaw* cannot be validly used as support for either.

It is important, then, that scholars approach judicial opinions from the early federal republic with a mind towards not only the words in the opinion, but also an appreciation that certain matters omitted from discussion because they were not relevant two hundred years ago could be quite germane to contemporary legal discourse.

Clearly, there are limitations to when this historicism can be applied. It is obviously impractical to expect a busy district court judge to research the historical circumstances of any given case. Scholars like Kronman and Scheppele, however, should bear some responsibility, especially when making factually intensive arguments, for ensuring that they get those facts right.



PLEASE DO NOT PUBLISH THIS ARTICLE IN ENGLAND: A JURISDICTIONAL RESPONSE TO LIBEL TOURISM

*Robert L. McFarland**

INTRODUCTION

If an American author publishes statements in a book which is purchased from an Internet bookseller by a citizen of a foreign country will the author lose her First Amendment rights in a defamation action brought in a foreign tribunal? If so, are American courts required to recognize and enforce judgments resulting from such foreign defamation actions?

The answer to the first question is yes. Foreign tribunals generally do not extend American authors and publishers First Amendment protection in defamation actions when the speech travels into the territorial sovereignty of the foreign nation. Consider the recent plight of one American author who was sued in England by a citizen of Saudi Arabia. In the aftermath of 9/11, Dr. Rachel Ehrenfeld, a counter-terrorism expert, authored a book examining the international web of financing supporting the activities of militant Islam throughout the world. Her book was published by an American publishing company in 2003.¹ A few months after the book's publication, Ehrenfeld received an email from a law firm in England. The English lawyers at the firm represented Sheikh Khalid bin Mahfouz, a wealthy citizen of Saudi Arabia and former chairman of the National Commercial Bank of Saudi Arabia.² The Saudi citizen's

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¹ RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED AND HOW TO STOP IT* (1st ed. 2003).

² See *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC 1156 (QB) (Eng.); see also *Ehrenfeld v. Mahfouz*, No. 04 Civ. 9641(RCC), 2006 WL 1096816 at *1 (S.D.N.Y. Apr. 26, 2006) ("Bin Mahfouz is a citizen of Saudi Arabia and was formerly the chairman and general manager of [t]he National Commercial Bank of Saudi Arabia."). According to *Forbes.com*'s list of global billionaires, Mahfouz's net worth is estimated to be \$3.2 bil-

English lawyers demanded that the American author withdraw all copies of her book from international circulation, destroy the books, issue a public apology to their client, and make a financial donation to a charity chosen by Mahfouz.³

Ehrenfeld refused. She was then sued in English High Court by the Saudi citizen. In his libel action, Mahfouz alleged that statements in Ehrenfeld's book were defamatory as defined by English law. He further alleged that his international reputation, or at least that portion of it residing in England, was damaged by Ehrenfeld's book.⁴ Despite England's few connections with the dispute and minimal interest in the litigation, the English High Court authorized use of England's long-arm powers and allowed the libel action to proceed. The English court justified England's involvement in the litigation on two Internet contacts with the dispute: (1) the purchase of twenty-three copies of the book in England via Amazon.com; and (2) "the first chapter was separately available on www.ABCnews.com" and viewable anywhere in England.⁵ Ehrenfeld refused to appear and the English court entered a default judgment awarding Mahfouz and his sons £30,000 and an additional fees £30,000 in fees and costs.⁶

lion. See Khalid Bin Mahfouz & Family, the World's Richest People, available at <http://www.forbes.com/lists/2006/10/JKTG.html> (last visited Mar. 12, 2009). Mahfouz has successfully obtained numerous libel judgments in Britain against publishers linking him to the worldwide financing of terrorism. See Bin Mahfouz Information-Litigation, available at http://www.binmahfouz.info/faqs_4.html (last visited Feb. 24, 2009). Mahfouz's British libel action against Cambridge University Press resulted in the destruction of all copies of the 2006 book *Alms for Jihad: Charity and Terrorism in the Islamic World*. See David Glenn, *Cambridge U. Press Agrees to Destroy Book on Terrorism in Response to Libel Claim*, THE CHRON. OF HIGHER ED., Aug. 10, 2007, at 13. Mahfouz has pursued similar libel actions against foreign publishers in Belgium. See Ken Silverstein, *Top Investigator in 9/11 Victims' Lawsuit Faces Libel Action*, L.A. TIMES, Feb. 26, 2003, at A18.

³ See RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED AND HOW TO STOP IT—THE BOOK THE SAUDIS DON'T WANT YOU TO READ* xi (rev. ed. 2005).

⁴ See *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC 1156 (QB).

⁵ See *id.* at ¶ 22.

⁶ Press Release, Kendall Freeman, English High Court Awards Substantial Damages to Sheikh Khalid Bin Mahfouz and His Sons (June 15, 2005), available at http://www.binmahfouz.info/news_20050503.html.

Unfortunately, Dr. Ehrenfeld's experience is not unusual.⁷ British courts are increasingly a hot spot for transnational libel disputes.⁸ Why Britain? Its strict liability libel scheme is libel-plaintiff friendly and its courts do not recognize the speech protections secured by the First Amendment as interpreted by *New York Times v. Sullivan*⁹ and its progeny.¹⁰ A string of recent English libel judgments entered against American authors and publishers in England demonstrates England's refusal to extend comity to speech rights of American citizens.¹¹ The international forum-shopping aspect of these suits is highlighted by the fact that several of the plaintiffs were not citizens of England.¹² These decisions are, in essence, a travel brochure sent out to the citizens of the world. The text of the brochure might read: Worried about your international image? Visit England. Our courts are at your service at little or no cost.¹³ No proof of actual malice—no worries. Allow us to protect your international reputation and enjoy your visit in our courts. Similar "libel tourism" actions are springing up elsewhere around the globe.¹⁴

Are state and federal courts in the U.S. required to recognize and enforce judgments entered in foreign defamation actions? The instinctive American response to this question is "ab-

⁷ For a detailed account of a British libel battle and the extent such actions interfere with First Amendment interests, see DEBORAH E. LIPSTADT, *HISTORY ON TRIAL: MY DAY IN COURT WITH DAVID IRVING* (2005). Professor Lipstadt, the Dorot Professor of Modern Jewish and Holocaust Studies at Emory University, was sued in England for statements identifying David Irving as a Holocaust-denier. *See id.* at xviii.

⁸ *See, e.g.*, Geoffrey Wheatcroft, Op-Ed., *The Worst Case Scenario: British Libel Law Means Our Press Is Vulnerable and the Wealthy Are Shielded from Criticism*, THE GUARDIAN, Feb. 28, 2008, at 32.

⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁰ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1975); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

¹¹ *See, e.g.*, *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004 (H.L.) (Eng.); *Lewis v. King* [2004] EWCA Civ 1329 (Eng.); *Dow Jones & Co., Inc. v. Jameel* [2005] EWCA Civ 75 (Eng.); *Richardson v. Schwarzenegger* [2004] EWHC 2422 (QBD) (Eng.).

¹² *Berezovsky*, 1 W.L.R. 1004; *Lewis*, EWCA Civ at ¶ 3.

¹³ British law firms are permitted to represent libel plaintiffs on the basis of a "no win, no fee" arrangement. *See Wheatcroft, supra* note 9 ("[England's] libel law has always been heavily weighted in favour of the plaintiff. Unlike the defendant in a criminal case or other civil suits—or in a US libel action—he is assumed to be in the wrong, and must prove that 'the words complained of' are true. Under 'no win, no fee', the plaintiff is gambling someone else's money, while the defendant is on a hiding to nothing.").

¹⁴ *See infra* notes 53-56 and accompanying text.

solutely not.” Libel tourism has provoked this response and many have called for outright refusal to recognize foreign defamation judgments in U.S. courts.¹⁵ Four states have responded to libel tourism with legislation aimed at protecting the First Amendment rights. New York was first to act adopting “Rachel’s Law” (a/k/a The Libel Terrorism Protection Act of 2008).¹⁶ The New York legislation prohibits the recognition or enforcement of any foreign libel judgment in New York’s tribunals unless the foreign judgment was obtained in a proceeding securing the American author or publisher her First Amendment rights.¹⁷ California¹⁸, Florida,¹⁹ and Illinois²⁰ have adopted similar legislation. These state statutes refusing recognition or enforcement of foreign judgments implicate foreign affairs issues of national concern.²¹ Congress is now considering a federal response.²²

¹⁵ See, e.g., Arlen Specter & Joe Lieberman, Op-Ed., *Foreign Courts Take Aim at Our Free Speech*, WALL ST. J., July 14, 2008, at A15; Adam Cohen, Op-Ed., “*Libel Tourism*”: *When Freedom of Speech Takes a Holiday*, N.Y. TIMES, Sept. 15, 2008, at A24; Writ Large: *Are English Courts Stifling Free Speech Around the World?*, ECONOMIST, Jan. 8, 2009 at 52; Floyd Abrams, Op-Ed., *Foreign Law and the First Amendment*, WALL ST. J., April 30, 2008, at A15. For an example of international criticism, see Duncan Campbell, *British Libel Law Violates Human Rights*, U.N. SAYS, THE GUARDIAN, Aug. 14, 2008, available at <http://www.guardian.co.uk/uk/2008/aug/14/law.unitednations>.

¹⁶ N.Y. CIV. PRAC. LAW § 302(d) (McKinney 2008). For a summary of the New York legislation see David D. Siegel, “*Libel Terrorism*” Bill, 239 N.Y.L.J. 2, Mar. 12, 2008. See also Press Release, New York State, Governor Patterson Signs Legislation Protecting New Yorkers Against Infringement of First Amendment Rights by Foreign Libel Judgments (May 1, 2008) available at http://www.state.ny.us/governor/press/press_0501082.html (last visited Nov. 25, 2009) (“The statute combats such ‘forum shopping’ in two ways. First, it bars New York courts from enforcing a foreign libel judgment unless the country where it was decided grants the same or better protection as U.S. standards for freedom of speech. Second, it expands an individual’s ability to have a court declare a foreign libel judgment invalid in New York. Without this statute, an author could be forced to live indefinitely under the pall of a libel judgment, deterring publishers from disseminating that author’s work.”).

¹⁷ See *id.*

¹⁸ 2009 Cal. Legis. Serv. Ch. 579 (S.B. 320) (West). For background on the California legislation, see S.B. 320 Bill Analysis prepared for the California Senate Judiciary Comm., available at http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0301-0350/sb_320_cfa_20090428_101640_sen_comm.html (last visited Nov. 25, 2009).

¹⁹ 2009 Fla. Sess. Law Serv. Ch. 2009-232 (H.B. 949) (West).

²⁰ 735 ILL. COMP. STAT. 5/2-209 (West 2008). See also *infra* notes 166-69 and accompanying text.

²¹ See AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2005). The viability of state legislation is beyond the scope of this article.

The problem of foreign libel actions is gaining more attention in the era of instantly global speech. The Internet intensified but did not create the jurisprudential problems associated with transient speech.²³ In 1953, Dean Prosser noted the complexity of issues related to international speech in the first footnote of his well-known article *Interstate Publication*.²⁴ Prosser did not examine the international issues but instead focused his attention on a number of complex issues arising from speech traveling between U.S. states.²⁵ A number of scholars have examined the question of recognition and enforcement of international libel judgments since Prosser's examination of interstate publication.²⁶ Nevertheless, there has yet to emerge an ade-

²² In 2008, the House passed H.R. 6146. This resolution provides that U.S. courts may not enforce foreign libel judgments "unless the domestic court determines that the foreign judgment is consistent with the first amendment." See H.R. 6146, 110th Cong. (as passed by the House, Sept. 27, 2008). The Senate did not consider the resolution prior to the adjournment of the 110th Congress.

In addition to H.R. 6146, Representative Peter King (R., N.Y.) and Senators Arlen Specter (R., Pa.) and Joe Lieberman (I., Ct.) introduced the Free Speech Protection Act of 2008 in the 110th Congress. See H.R. 5841 and S.B. 2977, 110th Cong. (2008). Unlike H.R. 6146, the Free Speech Protection Act would have created a new federal tort allowing the American author or publisher to sue the foreign libel plaintiff and seek compensatory and punitive damage. In effect, the act would punish a foreign libel plaintiff for seeking a civil remedy in foreign courts. The Free Speech Protection Act also proposed long-arm jurisdiction based solely on the foreign plaintiff's filing of a foreign suit against "a United States person." See *id.* See also Specter and Lieberman, *supra* note 15. The 110th Congress did not vote on the FSPA of 2008 prior to adjournment. The 111th Congress is now considering the Free Speech Protection Act of 2009. See H.R. 1304 (introduced Mar. 4, 2009) and S.449 (introduced Feb. 13, 2009).

²³ The role of the Internet in intensifying concerns regarding transient speech is well documented. As one observer notes:

In an era of global publishing, particularly over the Internet, the hazards of foreign speech and defamation laws are very much an American problem. And they have the potential to affect a wide range of defendants - from large media corporations to individuals clicking and clacking into cyberspace from their home PCs.

Bruce D. Brown, *Write Here. Libel There. So Beware*, WASH. POST, Apr. 23, 2000, at B01. See also, e.g., Floyd Abrams, *Foreign Law and the First Amendment*, WALL ST. J., Apr. 30, 2008 at A15.

²⁴ 51 MICH. L. REV. 959 (1953).

²⁵ *Id.* Shortly after publication of Prosser's article, many states adopted the Uniform Intrastate Publication Act. This act adopted the single-publication rule and, therefore, reduced the number of conflicts between states in state-defamation litigation.

²⁶ See Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 1982 (1994); Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to*

quate solution to the threat of foreign libel actions. American authors and publishers, in an era of instantaneously global publication, remain legitimately concerned about their exposure in foreign courts.²⁷

Foreign defamation judgments obtained against American authors give rise to a jurisprudential quandary. On one hand, foreign defamation judgments usually rest on substantive laws offering much less protection to the American speaker than would be available in U.S. courts pursuant to the First Amendment.²⁸ On the other hand, well-rooted doctrines of private international law and conflict of laws jurisprudence strongly favor the recognition of foreign judgments even though the receiving court disagrees with the policies and rules of decision underlying the foreign judgment.²⁹ This quandary is made more com-

Prevent English Defamation Actions from Chilling American Speech, 74 FORDHAM L. REV. 3073, 3076-77 (2006); Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999 (1994); Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM. & ENT. L.J. 235 (1994). For a summary of the European approach to the problem of trans-national speech, see DAVID I. FISHER, *DEFAMATION VIA SATELLITE: A EUROPEAN LAW PERSPECTIVE* (1998).

²⁷ See, e.g., CHARLES J. GLASSER JR., *INTERNATIONAL LIBEL AND PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS, AND LAWYERS*, xv-xvi (2006).

[T]here is no doubt that being sued for libel is something to avoid. When questions of international law appear, it raises the stakes even higher. The threat of libel litigation is now exacerbated by the reach of the Internet. . . . Given that libel suits are often ruinous, if not emotionally grueling, given that words are sent instantly around the world and archived forever, are there guidelines that reporters and editors should use? What is needed is a global approach requiring that reporters and editors review their practices and philosophy toward global newsgathering, and that they develop an understanding for the basic moral engine that drives each nation's media laws.

Id.

²⁸ See *id.* at xvi (2006) ("In many nations, there is no constitutional right to press freedom, but the constitution does recognize the personal rights (also called 'dignitary rights' in some jurisdictions). In many of these nations, there simply is no 'First Amendment' that trumps other rights."); see also *Telnikoff v. Matusevitch*, 702 A.2d 230, 248 (Md. Ct. App. 1997) (noting that "English defamation law flatly rejects the principles set forth in *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.*").

²⁹ See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 92 (1971). This deference rests on respect for the co-equal foreign sovereign's right to define the contours of substantive rights and liabilities within its borders. Justice Story, in his classic *Commentaries on the Conflict Between Foreign and Domestic Laws*, writes:

plex by statutes prohibiting the recognition and enforcement of the judgments of foreign tribunals and opening the door to pre-emptive declaratory relief against litigants appearing in foreign courts.³⁰ Are these legislative responses justified? Are they necessary?

Rejection of a foreign nation's legislative judgment regarding the proper balance between speech, privacy, and reputation solely because the foreign balance differs from that adopted by *New York Times Co. v. Sullivan*³¹ and its progeny³² invites reciprocal response to domestic policies which are given expression in U.S. judgments on a broad range of legal issues when those judgments are presented to foreign tribunals for recognition and enforcement. Yet Ehrenfeld's case, and others like it, demonstrates the need to do something to prevent foreign courts

[I]t is the province of every sovereignty to administer justice in all places within its territory and under its own jurisdiction, to take cognizance of crimes committed there, and of the controversies, that arise within it. Other nations ought to respect this right To undertake to examine the justice of a definitive sentence is an attack upon the jurisdiction of the sovereign, who has passed it. Hence Vattel deduces the general rule, that, in consequence of this right of jurisdiction, the decision made by the judge of the place within the extent of his authority, ought to be respected, and to take effect even in foreign countries.

JOSEPH STORY, COMMENTARIES ON THE CONFLICT BETWEEN FOREIGN AND DOMESTIC LAWS § 585. Judge Cardozo, in *Loucks v. Std. Oil Co.*, explained that courts usually enforce foreign judgments even though they conflict with the public policy of the forum because "[domestic courts] are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."120 N.E. 198, 201 (N.Y. Ct. App. 1918).

³⁰ There are two additional jurisprudential issues raised by state non-recognition statutes. First, because these statutes implicate a shared national interest in securing recognition of American judgments in foreign tribunals, it is possible that these statutes exceed state powers. Second, the state statutes appear to be a bright-line rule prohibiting recognition of foreign judgments lacking adequate protection for speech rights. However, because the statutes incorporate the First Amendment as the standard of protection, it will be necessary to examine the foreign defamation judgments in light of *Sullivan* and its progeny. In other words, the state courts will be required to explore factual issues which may not be in the record of the foreign proceedings (i.e., facts pertaining to limited purpose public figure status) and may be required to make legal judgments which are artificial at best (i.e., this foreign citizen is a limited purpose public figure and therefore entitled to the actual malice standard).

³¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³² See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1975); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

from stripping substantive rights away from American authors and publishers and undermining the First Amendment. So what can or should be done?

This article argues that the proper solution to these competing concerns should be grounded in jurisdictional restraint rather than substantive hubris. U.S. courts should refuse recognition and enforcement of foreign libel judgments only where those judgments are issued by a tribunal lacking jurisdiction. Well recognized principles of private international law justify collateral review of rejection of the jurisdictional findings of the foreign tribunal. It is also well-established that courts presented with foreign judgments should rarely, if ever, refuse enforcement on the basis of differing public policy and substantive law. This article argues that this traditional jurisdictional approach should be used to combat the problem of libel tourism and is preferable to the rejection of the foreign judgment on grounds of competing policy judgments respecting correlative rights of the defendant and speaker for speech published within the foreign nation's borders.

In order to develop this argument, Part I will define libel tourism and highlight the current range of responses available to an American author or publisher sued in a foreign tribunal on the basis of statements published originally in the United States. Part II then advances the jurisdictional argument that domestic courts should recognize or enforce foreign libel judgments only where the foreign tribunal's judgment rests on an adequate jurisdictional footing. In the most egregious libel tourism cases, like *Ehrenfeld's*, the reviewing court will be able to reject the foreign tribunal's judgment on a jurisdictional rather than substantive basis. Part III then briefly examines the legislative responses and argues for a measured strategic response to foreign libel judgments combining judicial restraint with necessary legislative and diplomatic responses. Specifically, this approach will then result in opportunities for the political branches to engage in much needed dialogue with foreign nations regarding protection of expressive rights.

I. WHAT IS "LIBEL TOURISM"?

What is "libel tourism"? The phrase refers to international forum shopping. The libel tourist is a plaintiff who files a libel action in a forum with laws favorable to the libel plaintiff.³³ The libel tourist's target is often an American author or publisher. Accordingly, the libel tourist is ordinarily attempting to circumvent the First Amendment by suing the American speaker in a foreign court.³⁴

A. *Libel Tourism in English Courts*

England is a well-known destination for libel tourists.³⁵ There are several reasons why libel tourists are attracted to English courts. First, England's substantive libel laws are attractive to the libel plaintiff. Unlike U.S. law, England's libel scheme is one of strict liability.³⁶ The *prima facie* libel action in

³³ See *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 46 (2009) (statement of attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP). See also Andrew M. Grossman, *Combating Libel Tourism: Federal Efforts Needed*, Background No. 2244, Feb. 25, 2009, available at <http://www.heritage.org/Research/LegalIssues/bg2244.cfm>.

³⁴ *Id.* Professor Doug Rendleman provides a helpful description of the libel tourist in *Collecting a Libel Tourist's Defamation Judgment?* 67 WASH. & LEE L. REV. 467 (2010).

³⁵ Three main groups have emerged as frequent libel tourists. First, celebrities, frequently American stars, travel to England to sue, among others, the *National Enquirer*. See *id.* According to one source, celebrities accounted for one-third of all libel actions brought in the United Kingdom in 2007. See Robert Verkaik, *London Becomes Defamation Capital for World's Celebrities*, THE INDEPENDENT, Oct. 13, 2008, at 4.

The second group of libel tourists is international business moguls. See *Libel Tourism: Hearing on H.R. 6146 supra* note 34. The most famous example of such a libel tourist is Boris Berezovsky, the Russian businessman, whose suit against *Forbes* was allowed to proceed by the House of Lords. See *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004 (H.L.) (U.K.).

The third group of libel tourists is plaintiffs like Mahfouz, citizens of Middle Eastern countries with alleged ties to terrorism. The number of libel suits filed by men like Mahfouz is significant enough that many in England refer to such libel actions as the "Arab Effect". See Richard N. Winfield, *British Libel Laws: Cutting Off Crucial Information* (Aug. 1, 2006) (reviewing INTERNATIONAL LIBEL AND PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS, AND LAWYERS (Charles J. Glasser Jr. ed., 2006)), available at <http://www.firstamendmentcenter.org/commentary.aspx?id=17223>.

³⁶ See *Libel Tourism: Hearing on H.R. 6146 supra* note 33, at 46. Attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP, in her testimony before Congress made the following statement:

England merely requires the plaintiff to plead and prove publication of a statement susceptible of defamatory meaning.

English courts also reject the single-publication rule which is widely accepted in American courts.³⁷ Thus, a separate cause of action accrues each time a defamatory statement is reprinted or downloaded.³⁸ This multiple publication approach, combined with England's very broad definition of publication,³⁹ enables libel plaintiffs to greatly extend the statute of limitations on their libel claims.⁴⁰ The English multiple publication rule also allows English courts to greatly expand their jurisdictional interest in libel controversies involving Internet publication.⁴¹

England's fee shifting rules also invite libel litigation.⁴² The English rule, shifting all fees to the losing party, is well known.

Stark differences exist between U.S. and English libel law. In many ways, libel laws in the U.S. and England constitute mirror images of each other, with the burden of proof shifted to defendant in the U.K. and the plaintiff in the U.S. English libel law is essentially based on a system of strict liability—you make a mistake, you pay . . . Under English law, any published statement that adversely affects an individual's reputation or the respect in which a person is held is *prima facie* defamatory. The plaintiff's only burden is to establish that the allegedly defamatory statements apply to them, were published by the defendant and have a defamatory meaning.

Id. (citations omitted).

Contrast U.S. law. In *Sullivan*, the Supreme Court determined that strict liability defamation schemes unduly burdened First Amendment rights and prohibited states from utilizing strict liability standards in defamation actions. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁷ See *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004 (H.L.) (Eng.). The single publication has been adopted in numerous state jurisdictions as a means of defining the place of publication and limit the potential nefarious results invited by the English approach. See, e.g., E.H. Schopler, Annotation, *Conflict of Laws with Respect to the "Single Publication" Rule as to Defamation, Invasion of Privacy, or Similar Tort*, 58 A.L.R. 2d 650 (1958).

³⁸ See, e.g., *King v. Lewis*, [2005] E.M.L.R. at 2 (Eng.) ("[B]y the law of England the tort of libel is committed where publication takes place, and each publication generates a separate cause of action.").

³⁹ For example, text posted on the Internet is "published" everywhere it is downloaded. See *id.*

⁴⁰ See *Loutchansky v. Times Newspapers Ltd.* [2002] QB 783.

⁴¹ See *id.*

⁴² *Libel Tourism: Hearing on H.R. 6146 supra* note 33, at 49 (statement of attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP) ("Another stark difference between the English and American systems emerges around the issue of attorneys fees. In England, the courts allow fee shifting. . . . This substantially increases the cost of litigation as most libel cases in the Great Britain [sic] require multiple attorneys.").

One of the justifications for this rule is that the plaintiff's risk of bearing the defendant's fees discourages the filing of frivolous claims. Even this incentive has been removed in the context of libel disputes because barristers are permitted to represent libel plaintiffs under "no win, no fee" fee agreements. These agreements allow the plaintiff's firm to bring libel cases on behalf of their clients with the firm agreeing to bear the risk of loss. Thus, libel plaintiffs are free from the ordinary English rule and free to file libel claims without fear of bearing the opposing party's fees and costs.

Although there have been some reforms in English libel law in recent years intending to extend protection for speech rights,⁴³ English law is not consistent with First Amendment jurisprudence.⁴⁴ The House of Lords has also adopted an expansive view of English jurisdiction in libel cases. Combine these factors with the "no win, no fee" arrangements and libel plaintiffs are sure to come. This combination of English laws facilitates libel forum shopping and enables the libel tourist to evade the First Amendment interests of the American author or publisher.

Mahfouz's above-described action against Dr. Ehrenfeld illustrates well the libel tourist's strategy.⁴⁵ Mahfouz also pursued several other libel actions in Britain (one notable action is Mahfouz's suit against Cambridge University Press which resulted in the pulping of every copy of the book *Alms for Jihad*).⁴⁶

One of the most significant libel tourism cases in England is the libel action filed by Russian businessman Boris Berezovsky against *Forbes* magazine in 1997.⁴⁷ Berezovsky, a citizen and resident of Russia, sued *Forbes*, an American magazine, in Eng-

⁴³ In *Jameel (Mohammed) v. Wall Street Journal Europe*, the House of Lords announced a privilege of "fair comment" in an effort to protect "responsible journalism." [2006] UKHL 44. This privilege indicates that English jurists are aware of the chilling impact of England's libel laws on journalism there and are now offering some protection to journalists. The fair comment privilege, however, does not offer the publisher the same level of security guaranteed by the First Amendment. See Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL'Y 415, 445 (2008).

⁴⁴ See, e.g., GLASSER *supra* note 28 at 273-74.

⁴⁵ See *supra* notes 1-7 and accompanying text.

⁴⁶ See *supra* note 2.

⁴⁷ Berezovsky v. Michaels [2000] 1 W.L.R. 1004 (H.L.) (Eng.).

land alleging that an article researched in Russia and published in America damaged a portion of his reputation residing in Britain.⁴⁸ Despite only .02% of *Forbes*' total circulation making its way into Britain, the House of Lords determined that England had a sufficient interest in the controversy to acquire jurisdiction over the foreign defendants and compel them to pay a Russian citizen substantial damages.⁴⁹ *Forbes* was also ordered to publish an apology.⁵⁰

Berezovsky is significant because in it the House of Lords placed its stamp of approval on England's adjudicative (and legislative) engagement in trans-national libel disputes having little connection with England. In *Berezovsky*, none of the parties were English citizens or domiciliaries. The libel litigation regarded a magazine article published in a U.S. magazine regarding activities occurring in Russia. The plaintiff argued that England had an interest in the litigation because his international reputation was damaged within the territorial borders of England by the copies of *Forbes* circulated in England and viewed on the Internet. The defendant sought dismissal on *forum non conveniens* grounds arguing that England's interest in the litigation was insufficient to justify its involvement in litigation and that the English libel action would deprive the defendant of its speech rights.

Lord Hoffman rejected the defendant's *forum non conveniens* challenge and reasoned that *any* plaintiff libeled in England (presumably on the basis of a single publication there) should be allowed to choose England as the forum to vindicate his reputation.⁵¹ If England has a justiciable interest in a libel dispute on the basis of publication within its borders then England would be a proper forum in any libel action based on Internet publication viewed in England. Lord Hoffman's reasoning would allow England to regulate and police all speech viewable

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ "I do not have to decide whether Russia or America is more appropriate *inter se*. I merely have to decide whether there is some other forum where substantial justice can be done. . . . If a plaintiff is libeled in this county, *prima facie* he should be allowed to bring his claim here where the publication is." *Id.*

on the Internet. As argued below, such an expansive view of jurisdiction in cases involving American publishers violates the due process rights of many American speakers. English judgments resting on such extravagant jurisdictional claims are open to collateral attack in U.S. courts on jurisdictional ground.

B. *Libel Tourism Around the World*

England is not the exclusive destination for libel tourists.⁵² Australia is another popular destination. In *Dow Jones v. Gutnick*,⁵³ the High Court of Australia authorized jurisdiction over an American newspaper on the basis of evidence that Australian citizens viewed information on the newspaper's website.⁵⁴ Publication occurred within Australia, according to the court, because the American newspaper was viewable in Australia on the Internet. Like Lord Hoffman's reasoning in *Berezovsky*, the court's reasoning in *Gutnick* allows publication within territorial borders to become the lynchpin of jurisdictional analysis in trans-national libel disputes.⁵⁵ In these cases, reputation is viewed as residing in countries around the world supporting *in rem* jurisdiction. As discussed below, this theory violates fundamental conceptions of due process. Judgments like *Gutnick* are accordingly open to collateral jurisdictional attack in U.S. courts.⁵⁶

Under all the substantive conflicts of expressive rights on full display in the libel tourism cases lies an even more disturbing trend: the rapid expansion of adjudicative jurisdiction resting on isolated, random and insignificant contacts with the forum. As discussed in Part II, the exercise of jurisdiction in cases like *Gutnick* and *Berezovsky* offends traditional notions of fair

⁵² See *Singapore to Charge a WSJ Editor With Contempt*, WALL ST. J., Mar. 16, 2009 at B5; see also *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Judiciary Comm.*, 111th Cong. (2009) (statement of attorney Laura R. Handman, a partner in the firm Davis Wright Tremaine LLP) (explaining that in addition to England, Australia, New Zealand, Singapore, and Kyrgyzstan have all entertained libel suits against American authors or publishers in their tribunals).

⁵³ *Dow Jones v. Gutnick*, (2002) 210 C.L.R. 575 (Austl.).

⁵⁴ *Id.*

⁵⁵ *Id.* at ¶48. (citing *Berezovsky*, 1 W.L.R. 1004).

⁵⁶ See *infra* notes 63-100 and accompanying text.

play and substantial justice. These judgments should be collaterally attacked in U.S. courts and denied enforcement on the basis that the foreign tribunal's exercise of judicial power violates fundamental principles of due process.

C. Is Libel Tourism Ordinary Forum Shopping?

Forum shopping is generally viewed in a negative light and often discouraged. In some ways libel tourism gives rise to the same juridical complications traditionally associated with forum shopping. However, there are three attributes of libel tourism that add complexity to this sort of forum shopping.

First, because libel tourism arises in the context of trans-border communications in the era of instantly global communications, the libel tourist may theoretically choose any forum in the world. If publication within the territorial borders is completed by simply viewing the allegedly defamatory material in the desired forum, then all a libel tourist needs to do to establish jurisdiction within the forum is find one person who has viewed the material on the Internet within the forum. This may not even be necessary. Perhaps all that is necessary is for the libel tourist's attorney to access the information on the Internet within the desired forum. If the libel tourist is able to enter foreign courts using such broad procedural and jurisdictional laws in order to litigate the dispute in the forum with favorable substantive libel law, then non-resident authors and publishers are exposed to international police power regulating speech which will suppress speech not only in the United States but also around the world.

Second, libel tourism is complex given the great diversity in the various normative approaches to defamation (both procedural and substantive) in private international law. Add to this the fact that libel actions present notoriously difficult choice of law issues. Because these issues arise in the international context, they must be resolved without the overarching framework provided by the Full Faith and Credit or Supremacy Clauses in similar disputes arising between litigants in different states. Thus, any solution to the problem of libel tourism necessarily requires attention to sovereignty, jurisdiction, comity, and foreign relations. Several recent cases illustrate the complexity of

such analysis.⁵⁷ The complexity of these issues in the context of libel law is highlighted by recent failed efforts to achieve consensus regarding the recognition of foreign libel judgments. For example, the Brussels and Lugano Conventions failed to achieve consensus regarding the recognition and enforcement of foreign libel judgments despite obtaining consensus regarding the enforcement of a broad range of civil judgments. Similarly, efforts to ratify a new convention on the recognition of foreign judgments at the Hague Convention fell apart due, in part, to differences regarding libel actions.

The third unique attribute of libel tourism, and perhaps most important, is the fact that it exposes a growing international conflict regarding the proper scope of free expression in the communication age. American citizens publish statements with the expectation of rights secured by the First Amendment. In the United Kingdom, on the other hand, an individual's interest in privacy and reputation are given greater weight than free expression. If the United Kingdom acquires jurisdiction over the American publisher on the basis of a statement contained in a book purchased via the Internet it may deny the American speaker her First Amendment rights by imposing its own libel law. This is exactly what happened to Dr. Ehrenfeld.

So what can be done to protect the American author or publisher from the libel tourist? Are foreign libel judgments per se invalid? Should American courts entertain collateral attack on grounds of public policy? In order to examine these questions, the following section examines the legal options presently available to the American author/publisher.

II. RESPONDING TO FOREIGN LIBEL LITIGATION

An American author or publisher has several options available to them when threatened with a foreign libel lawsuit. This section explores these options in order to determine whether a

⁵⁷ See, e.g., *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992); see also *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995);

direct preemptive or collateral attack on the public policy of the foreign nation is necessary or justified.⁵⁸

As an initial matter, the reaction of most ordinary American authors notified that they are being sued overseas will probably be similar to that of Professor Deborah Lipstadt. In 1995, Professor Lipstadt received a letter threatening an English libel action on the basis of statements contained in her scholarly book *Denying the Holocaust: The Growing Assault on Truth and Memory*.⁵⁹ According to Lipstadt, her initial reaction to the letter was laughter:

After reading but a few lines, I laughed aloud Given that virtually everything I said about [the prospective plaintiff] could be traced to a reliable source, I was certain that [providing my lawyers with all of my source material] would be the end of the matter. . . . As it turned out, I was wrong on all counts.⁶⁰

Lipstadt's laughter turned into five expensive, inconvenient and emotionally draining years fighting the libel action in Britain while trying to maintain her life in the United States.⁶¹ It should be noted that Lipstadt was victorious in England and vindicated the veracity of her statements in the libel action.⁶² There is considerable value to standing behind one's speech and fighting accusations of defamation. Nevertheless, many defendants will not be up for the fight.

It is never fun or convenient to be sued anywhere. Still, the plight of the American author/publisher threatened with an English libel proceeding is uniquely frustrating. Unless the American author or publisher has specifically targeted the foreign market or purposefully directed their statements into that market, then there is no reason to expect the foreign nation

⁵⁸ The state legislation and the proposed federal legislation authorize preemptive attacks by enabling the defendant in the foreign libel action to file an action for declaratory relief in U.S. courts. A collateral attack on the public policy of the foreign nation occurs where the U.S. courts refuse recognition or enforcement on the sole ground that the judgment violates the First Amendment. See *supra* note 22 and accompanying text.

⁵⁹ See LIPSTADT, *supra* note 7 at xvii-xviii.

⁶⁰ *Id.* at xvii-xix.

⁶¹ *Id.*

⁶² *Id.* at 275.

would have authority to regulate speech. This instinctive response is a natural starting point for inquiry into the options available to the author.

A. Contest the Jurisdiction of the English Court

What gives England the right to regulate the speech of an American citizen? This fundamental question will probably be the first question on the American author's mind.

Historically, courts were powerless to enter judgments against non-residents.⁶³ Judicial power was coterminous with territorial sovereignty over people and property.⁶⁴ Substantial increases in interstate (and international) commerce led the U.S. Supreme Court to replace the rigid territorial conception of power with the more flexible "minimum contacts" test.⁶⁵ The familiar *International Shoe* standard allows a U.S. forum to compel a non-resident defendant to appear in its courts but only if the non-resident has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁶

The minimum contacts standard allows a broader realm of judicial power, but the test is not unlimited. At its core, the *International Shoe* standard is a question of fairness and the test is one of reasonableness.⁶⁷ Considering a non-resident's activities which bring her in contact with the forum, would an average person "reasonably anticipate being haled [sic] into court there"?⁶⁸ The Court has repeatedly emphasized that whether the non-resident "purposefully availed" herself of the protection

⁶³ *Pennoyer v. Neff*, 95 U.S. 714 (1877). Sovereignty over non-residents could be accomplished if the non-resident held property within the state. *Id.* at 733. But unless the defendant or the defendant's property were physically present within the state's borders, there was no jurisdiction. *Id.* *Pennoyer* also permitted entry of a personal judgment against a non-resident defendant where the defendant voluntarily appeared to respond to the complaint. *Id.*

⁶⁴ *Id.*

⁶⁵ *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁶⁶ *Id.* at 316.

⁶⁷ *Id.* *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 24 cmt. b (1971) ("One basic principle underlies all rules of jurisdiction. This principle is that a state does not have jurisdiction in the absence of some reasonable basis for exercising it.")

⁶⁸ *Calder v. Jones*, 465 U.S. 781, 790 (1984) (citations omitted).

of the forum's laws is the central question.⁶⁹ Incidental and minor contacts between the non-resident and the forum are not enough to satisfy the constitutional standard.⁷⁰ Mere awareness that one's activity might result in effects in a foreign forum is also insufficient to support exercise of jurisdiction over the actor.⁷¹ In *Palovich v. Superior Court*, the California Supreme Court, in an internet defamation action, determined that a foreign speaker's knowledge that his speech posted on the Internet would harm the reputation of citizens residing in California "by itself, cannot establish purposeful availment under the effects test."⁷²

Traditional notions of private international law and comity justify collateral inquiry into the jurisdictional basis of the foreign libel action when the foreign court's judgment is presented for recognition and enforcement.⁷³ Collateral inquiry into the

⁶⁹ See e.g., *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) ("The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) ("When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there . . . The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.") (citations omitted); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) ("We now find this latter position to be consonant with the requirements of due process. The 'substantial connection,' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.") (citations omitted).

⁷⁰ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person,' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.") (citations omitted).

⁷¹ *Asahi Metal*, 480 U.S. at 105.

⁷² *Palovich v. Superior Court*, 58 P.3d 2, 11 (2002).

⁷³ See *Hilton v. Guyot*, 159 U.S. 113, 158 (1895) ("In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that where there has been opportunity for a full and fair trial abroad *before a court of competent jurisdiction*, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of

jurisdiction of the foreign court is authorized, in part, by the sovereignty of the court asked to recognize and enforce the foreign judgment. Such inquiry is greatly favored over collateral attack on the basis of differing conceptions of public policy on which the foreign judgment rests.⁷⁴ Accordingly, a foreign nation's attempt to compel an American author or publisher to appear before its courts must rest on an adequate jurisdictional grounds. England's attempt to compel Ehrenfeld to appear in its courts, for example, must rest on an adequate jurisdictional foundation. A judgment entered without jurisdiction is void and unenforceable.⁷⁵

But what law applies to determine whether there is jurisdiction? Must the reviewing court, in its collateral examination of the jurisdiction of the foreign tribunal, defer to the foreign court's jurisdictional analysis? This sort of rubber-stamping is not collateral review. Instead, courts are expected to turn to fundamental conceptions of adjudicative jurisdiction. These first principles of judicial power are those subsumed in the due process clauses of the Constitution as interpreted by *International Shoe* and its progeny.

This brings us to the central issue: would England's assertion of power over an American author, like Dr. Ehrenfeld, satisfy due process? If the answer is yes, then U.S. courts (absent legislation) would be required to enforce the judgment *or* set it aside on the ground that it violates the public policy of the forum (and thereby disparage the foreign nation's legislative judgment in a dispute in which it had adjudicative jurisdiction). If the answer to this question is no, then the U.S. court can deny enforcement of the foreign judgment without proceeding to a collateral policy inquiry.

justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.") (emphasis added).

⁷⁴ See *Hilton*, 159 U.S. 113 and AM. LAW INST., *supra* note 21, at §5 n. 7.

⁷⁵ See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 24 cmt. e (1971).

Many presume that jurisdictional analysis is irrelevant in the era of Internet communication because speech travels so freely over territorial borders. It is tempting to quickly overlook the jurisdictional argument for several reasons, not least of which is its complexity. Yet, close examination of the *International Shoe* standard as applied to libel actions supports the conclusion that jurisdiction in the era of Internet publication is still a relevant and useful doctrine. When does a state or nation acquire jurisdiction in a libel dispute?

1. Libel actions and the "Effects Test"

In *Calder v. Jones*,⁷⁶ the Court examined the contours of jurisdiction in an interstate libel dispute. The plaintiffs in the action, Shirley Jones and her husband, sued the *National Enquirer*, a reporter, and Calder, the president and editor, of the national magazine for libel in California state court.⁷⁷ The reporter and editor were both Florida residents whose personal contacts with California were limited.⁷⁸ The alleged libel was published in an article written in Florida based, in part, on the reporter's telephone calls with contacts in California.⁷⁹ The reporter and editor of the article challenged the jurisdiction of the California court arguing that their limited personal contacts with California did not satisfy the minimum contacts test.⁸⁰

The Court disagreed and held that jurisdiction was "proper because of [the defendants'] intentional conduct in Florida cal-

⁷⁶ *Calder v. Jones*, 465 U.S. 783 (1984).

⁷⁷ *Id.* at 785-86.

⁷⁸ *Id.*

⁷⁹ *Id.* at 785.

⁸⁰ *Id.* at 786. The reporter and editor also argued that the First Amendment entitled them to more robust protection from foreign libel suits. The California state superior court determined that such protection was warranted in order to avoid a potential chilling effect on the defendants' speech. *Id.* In reversing the decision, the Supreme Court specifically rejected this argument:

We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry. Moreover, the potential chill on protected First Amendment activity is already taken into account in the constitutional limitations on the substantive law governing such suits.

Id. at 790 (citations omitted).

culated to cause injury to [Jones] in California.”⁸¹ *Calder* is a relatively short opinion with the deceptive appearance of simplicity. The holding of the case is easy to memorize: “Jurisdiction over [non-resident defendants] is therefore proper in California based on the ‘effects’ of their Florida conduct in California.”⁸² On the surface, *Calder* appears to broadly authorize jurisdiction in libel cases and allow courts to assert jurisdiction wherever the alleged publication travels (as it is foreseeable that a statement published on the Internet, for example, is instantly global).⁸³ This reading of *Calder* lends support to the holdings in *Berezovsky* and *Gutnick*.⁸⁴

A closer reading of *Calder*, however, demonstrates that the Court did not authorize a special category of broad libel jurisdiction (i.e., jurisdiction wherever the speech is found) and did not dramatically alter the traditional minimum contacts test in libel cases. Instead, the Court’s holding rests on the same jurisprudential principles articulated in *International Shoe*.⁸⁵ The Court’s citations in support of the “effects test” are instructive.

The first authority cited in support the effects of speech entering the forum from another state is the Court’s prior decision in *World-Wide Volkswagen Corp. v. Woodson*.⁸⁶ In *World-Wide Volkswagen* the Court held that Oklahoma’s attempt to compel a New York auto dealer and distributor to appear in a products liability action in Oklahoma violated due process.⁸⁷ The plaintiffs in the case argued that out-of-state auto dealers should be subjected to jurisdiction in Oklahoma because “an automobile is mobile by its very design and purpose [and] it was ‘foreseeable’ that the [automobile] would cause injury in Oklahoma.”⁸⁸ The Court rejected this argument noting that “‘foreseeability’ alone

⁸¹ *Id.* at 791.

⁸² *Id.* at 789.

⁸³ See Tara Blake Garfinkel, *Jurisdiction Over Communication Torts: Can You Be Pulled Into Another Country’s Court System for Making a Defamatory Statement Over the Internet? A Comparison of English and U.S. Law*, 9 TRANSNAT’L LAW. 489, 530 (1996) (describing the tendency to broadly interpret *Calder*’s effects test as broadening the jurisdiction of courts in interstate libel disputes).

⁸⁴ See *supra* notes 11-12 and 53-55, and accompanying text.

⁸⁵ See *Calder*, 465 U.S. at 790.

⁸⁶ 444 U.S. 286 (1980).

⁸⁷ *Id.* at 295.

⁸⁸ *Id.*

has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”⁸⁹ Instead, the Court explained that a plaintiff must point to conduct on the part of the defendant creating a nexus with the forum substantial enough to support the conclusion that the defendant “should reasonably anticipate being hauled into court there.”⁹⁰

The argument advanced by those supporting jurisdiction in many libel tourism cases is remarkably similar to the argument rejected by the Court in *World-Wide Volkswagen*. Speech, like an automobile, travels. In an era of global communication, it is foreseeable that speech will cross borders (state or national) and, like the automobile in *World-Wide Volkswagen*, it is foreseeable that the speech could cause harm anywhere in the world. But foreseeability of the transitory nature of speech and its potential for effects elsewhere in the world is an inadequate basis for the exercise of personal jurisdiction over the speaker. There must be more to establish a nexus between the speaker and the foreign forum such that the speaker should foresee the foreign nation’s interest in exercising its power over the speaker. Without this limitation then any person who posts anything on the Internet is subjected to the regulatory power of every sovereign in the world.

Consider this jurisdictional argument in the context of the Mahfouz suit against Ehrenfeld in England. When Ehrenfeld authored and published her book it was foreseeable that her speech would make its way into England (what could she do to prevent this from occurring but remain silent?). Is this fact alone enough to support the conclusion that she should have anticipated being hauled into court in England? According to the Court’s holding in *World-Wide Volkswagen*, Ehrenfeld must reasonably expect to be “hauled into court” based on her speech or else the foreign tribunal lacks personal jurisdiction. Because *Calder* cites *World-Wide Volkswagen* in support of its holding it is clear that the Court in *Calder* did not intend to create a special zone of libel jurisdiction following the speech wherever it might travel.

⁸⁹ *Id.*

⁹⁰ *Id.* at 297.

The Court's other citation in support of its holding in *Calder* is also instructive.

In support of its determination that the California effects of the Florida editor's activities justified California's exercise of jurisdiction over the non-residents, the Court cited section thirty-seven of the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS.⁹¹ This section deserves careful attention. It provides:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects *unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable*.⁹²

The section does not purport to authorize jurisdiction anywhere in the world where one's conduct causes harm. Instead, the reasonableness inquiry is preserved.⁹³ A state may not focus solely on the plaintiff's injury within the forum (i.e., the effects within the forum) and ignore the publisher's relationship with the forum. Traditional notions of fair play and substantial justice require that a non-resident publisher's conduct be such that he should reasonably expect to be subjected to the regulatory and judicial power of the forum.⁹⁴

The *Calder* holding makes clear that the effect of a non-resident's extraterritorial activities within the forum is relevant in the *International Shoe* minimum contacts inquiry.⁹⁵ *Calder*, however, did not supplant the *International Shoe* test in the First Amendment arena authorizing jurisdiction over the speaker wherever their speech travels. The jurisdictional inquiry remains one focused on the non-resident speaker's con-

⁹¹ *Calder*, 465 U.S. at 798.

⁹² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971) (emphasis added).

⁹³ *Id.*

⁹⁴ "A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere. The state may exercise judicial jurisdiction on the basis of such effects over the individual who did the act, or who caused the act to be done, provided that the nature of these effects and of the individual's relationship to the state are such as to make the exercise of jurisdiction fair to the individual and reasonable from the standpoint of the international and interstate systems." *Id.* at cmt. a.

⁹⁵ *Calder*, 465 U.S. at 789.

tacts with the forum.⁹⁶ Specifically, a court must conduct a qualitative evaluation of the non-resident's contacts to determine whether they amount to a purposeful availment of the protection of and corresponding regulation of the forum's laws.⁹⁷ Foresight that speech will enter the forum does not, on its own, establish a nexus between the forum and the speaker.⁹⁸

A recent string of circuit cases support the conclusion that *Calder's* effects test does not create a broad zone of speech jurisdiction.⁹⁹ Other circuit cases in the context of Internet activities having effects in foreign jurisdictions reinforce the modern tendency to limit application of the effects test in the context of Internet conduct.¹⁰⁰

⁹⁶ *Id.* at 788.

⁹⁷ See *Hansen v. Denckla*, 357 U.S. 235, 253 (1958).

⁹⁸ *Palovich v. Superior Court*, 58 P.3d 2 (Cal. 2002).

⁹⁹ See generally *Remick v. Manfredy*, 238 F.3d 248, 258 (3rd Cir. 2001) (interpreting *Calder's* effects test to be limited to situations where the publisher "expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity"); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002) (rejecting the argument that *Calder* authorized jurisdiction over non-residents who maintain Internet websites accessible in the forum); *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002) (rejecting the argument that *Calder* authorized jurisdiction over non-residents who post information to electronic bulletin boards accessible via the Internet in the forum); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994) (rejecting the argument that *Calder* authorized jurisdiction over non-resident publishers who issue press release which would foreseeably be disseminated in the forum); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (rejecting the argument that *Calder* authorized jurisdiction over non-resident publisher who had knowledge that independent publisher might reprint statements in forum).

¹⁰⁰ See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002) ("Applying the traditional due process principles governing a State's jurisdiction over persons outside of the State based on Internet activity requires some adaptation of those principles because the Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the that a state has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.").

2. What level of publication within the forum is necessary to establish jurisdiction?

Keeton v. Hustler Magazine, Inc.,¹⁰¹ decided on the same day as *Calder*, held that Hustler Magazine, a foreign defendant, had satisfied the traditional minimum contacts test and could be sued in the forum state for defamation.¹⁰² The Court explained that *Hustler* was a mass media defendant who had “continuously and deliberately exploited the [forum-state’s] market.”¹⁰³ The Court determined that “regular monthly sales of thousands of magazines [within the forum]” could not be characterized as “random, isolated, or fortuitous” contacts but were instead continuous and systematic contacts with the forum sufficient to subject Hustler to jurisdiction in the forum.¹⁰⁴

One implication of *Keeton* is that not every published statement is a sufficient basis for jurisdiction over the non-resident publisher. A corollary to the *Keeton* rule is that due process precludes the assertion of judicial power over any non-resident when her statements travel into the forum as a result of random, isolated, or fortuitous action.¹⁰⁵

Consider an individual (A) who posts statements on a blog. The blog is hosted on a server located in state X and A is a resident of state X. Given the nature of the Internet, any reasonable blogger would foresee that individuals in state Z could view the statements on A’s blog by accessing the Internet using computers located in state Z. But, according to *Calder*, A’s knowledge that her statements are viewable anywhere in the world does not transform each of her posts into systematic contacts with state Z. There must be more.

What if A compiles some of her more popular posts and publishes a book. A offers her book for sale over her blog. If an individual (B) in state Z purchases a copy of A’s book using an order form on A’s blog is this a sufficient contact to support another

¹⁰¹ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

¹⁰² *Id.* at 781.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 774.

¹⁰⁵ *Id.*

individual's (*C*'s) defamation suit against *A* in state *Z*?¹⁰⁶ In other words, does one isolated contractual contact with the forum expose one to general jurisdiction within the forum? The answer to this question is most certainly no.¹⁰⁷ Nevertheless, many presume, and the English courts in the Ehrenfeld litigation held, that authors and publishers who extract some benefit from the forum are somehow uniquely exposed to general jurisdiction there.¹⁰⁸

A surface reading of *Keeton* supports the conclusion that circulation within the forum subjects an author or publisher to jurisdiction there. However, as noted by several circuit courts, such a reading of *Keeton* (and *Calder*), would eviscerate personal jurisdiction in the context of Internet communications.¹⁰⁹ *Keeton* need not be read so broadly. The Court's holding presupposes that there must be more than "random, isolated or minor" contacts with the forum to support the exercise of jurisdiction. Unlike *Hustler Magazine*, who the Court noted received continuous economic benefits from the forum by circulating thousands of magazines within the forum every month, the blogger *A*'s statements made their way into state *Z* in a foreseeable but indirect manner. Even when *A*'s book was offered for sale, her statements were not purposefully directed to the state *Z* market. Both the blog and the book were offered to the world through the Internet. Accordingly, the statements were not purposefully directed to any specific forum. It would be unreasonable to subject our blogger to state *Z*'s judicial and regulatory power merely because *A* posted statements to a server in state *A*.¹¹⁰ It is unreasonable to expose *A* to state *Z*'s general regulatory power (outside of its interest in regulating the spe-

¹⁰⁶ *A*'s contact with State *Z* would likely be sufficient to support the assertion of personal jurisdiction over *A* in a breach of contract action with *B* as an exercise of specific jurisdiction over *A*.

¹⁰⁷ See *supra* notes 68-72 and accompanying text.

¹⁰⁸ For example, Ehrenfeld sold twenty-three books in England. Surely these contacts are sufficient to subject her to the jurisdiction of English courts in cases regulating these contractual transactions (i.e., if she failed to deliver the books she could be sued for damages).

¹⁰⁹ See *supra* note 99.

¹¹⁰ See, e.g., Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. L. REV. 1157 (2006), available at SSRN: <http://ssrn.com/abstract=898013>.

cific issues related to the contract with B) on the basis of an isolated order from a resident of state Z.

This analysis supports the conclusion that state or federal courts would lack jurisdiction over a non-resident publisher solely on the basis of isolated statements entering the forum. Likewise, when a foreign forum lacks contacts sufficient to compel a non-resident, like Ehrenfeld, to appear before its tribunals then the foreign court lacks jurisdiction to enter judgment in the case. Authors like Ehrenfeld should argue that attempts to exercise *in personam* jurisdiction over them on the basis of random or isolated contacts are foreign attempts to expand the adjudicative jurisdiction of tribunals beyond the bounds of fundamental fairness and due process of law.

3. Challenging Jurisdiction in England

As demonstrated above, the assertion of jurisdiction on the basis of random or isolated publication of statements within a forum is not an adequate basis for the exercise of personal jurisdiction over the non-resident speaker. Nevertheless, this jurisdictional argument is not likely to be effective if asserted directly as a defense in an English libel lawsuit. Why? As noted above, England has adopted an expansive view of its adjudicative jurisdiction in libel disputes.¹¹¹

England follows a procedural, as opposed to constitutional, view of judicial power over persons.¹¹² Except in cases proceeding pursuant to the provisions of the Brussels Convention, an English court can exercise personal jurisdiction in three circumstances: (1) where the defendant is present in England and served with process there; (2) where the defendant submits to the jurisdiction of the English court; or (3) where the plaintiff obtains judicial authorization to serve a summons outside the territorial borders of England.¹¹³ Where extra-territorial service

¹¹¹ See *supra* note 51 and accompanying text.

¹¹² See Tara Blake Garfinkle, *Jurisdiction Over Communication Torts: Can You Be Pulled Into Another Country's Court System for Making a Defamatory Statement Over the Internet? A Comparison of English and U.S. Law*, 9 TRANSNAT'L LAW. 489, 515 (1996).

¹¹³ See, e.g., Amit M. Sachdeva, *International Jurisdiction in Cyberspace: A Comparative Perspective*, 13(8) C.T.L.R. 245, 251 (2007) (U.K.) (citations omitted).

is authorized, the defendant is permitted to challenge the propriety of the long-arm authorization or move for dismissal on grounds that England is *forum non conveniens*.¹¹⁴

English courts have interpreted these jurisdictional principles very broadly in the context of libel disputes. Accordingly, as demonstrated by *Berezovsky*, English judges liberally authorize extra-territorial service in libel actions.¹¹⁵ In *Berezovsky*, a Russian government official and businessman, sued an American magazine, its editor and the author of an article for libel in England. The plaintiff applied for extra-territorial service pursuant to an English rule authorizing long-arm service where "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within [the forum]."¹¹⁶ The defendants argued that England had an insufficient interest in the controversy and that a U.S. or Russian forum would be more appropriate. The House of Lords rejected this argument and held that because the Russian businessman had a reputation in England and defamatory material was published there England had jurisdiction to hear the case.¹¹⁷

Thus, according to the reasoning of the House of Lords in *Berezovsky*, anyone who transacts any business in London or elsewhere in England is deserving of the protection of England's defamation laws. Defendant publishers should foresee this regulatory interest and are therefore compelled to appear and defend the veracity of their published statements. Thus, all the plaintiff must do to establish English jurisdiction is prove that statements were published in England. With the ability to access nearly any statement on the Internet, it is hard to imagine a situation where England would not obtain jurisdiction pursuant to *Berezovsky's* reasoning.

Consider the application of this analysis in Mahfouz's suit against Ehrenfeld. The English court determined that English jurisdiction was appropriate on the basis of only two contacts:

¹¹⁴ *Id.*

¹¹⁵ *Berezovsky v. Michaels*, [2000] 1 W.L.R. 1004 (H.L.) (U.K.).

¹¹⁶ *Id.* at 1004 n.1. (citing R.S.C., Ord. 11, r. 1(1)(f)).

¹¹⁷ *Id.* at 1012-13 ("[This] is . . . a case in which all the constituent elements of the torts occurred in England. The distribution in England of defamatory material was significant. And the plaintiffs have reputations in England to protect.").

(1) the purchase of twenty-three copies of her book (purchased from an Internet book seller) in England; and (2) evidence that the first chapter of her book was viewable in England via a U.S. news agency's website. Unlike the defendants in *Calder* and *Keeton*, Ehrenfeld had no reason to believe that her conduct would subject her to England's sovereignty. She had not purposefully availed herself of the protections of English law. Unlike the plaintiffs in *Calder*, Mahfouz is not a resident of the forum and Ehrenfeld had no reason to expect her statements to have a specific effect in England. These distinctions demonstrate that Ehrenfeld's contacts with England are tenuous, at best, and would not satisfy the core reasonableness inquiry sufficient to satisfy due process in an American forum.¹¹⁸ Yet they are sufficient in England.

This discussion highlights a jurisprudential conflict more fundamental than the differing legislative conceptions of speech and privacy. In addition to conflicts regarding expressive rights, the most offensive libel tourism judgments are those which subject U.S. authors and publishers to the legislative and adjudicative sovereignty of a foreign nation on the basis of random, isolated, and insignificant (often Internet) contacts. In other words, in addition to violating the First Amendment, these foreign libel judgments offend due process and fundamental fairness.

There are two important implications to this conclusion: (1) English judgments rendered in cases like Ehrenfeld's should be unenforceable in American forums, applying the common law's approach to recognition of foreign judgments, because the English courts lack jurisdiction over the parties; and (2) American courts need not respond to English judicial overreaching by relying on the public policy exception where the jurisdictional exception is available. These points will both be discussed in more detail below.

The American author/publisher should consider challenging the jurisdiction of the English court. However, it is unlikely that the English courts will demonstrate judicial restraint. Thus, the author/publisher will need to consider other options.

¹¹⁸ See *supra* notes 1-7 and accompanying text.

B. Challenge the English Venue as Forum non Conveniens

Both English¹¹⁹ and American¹²⁰ courts recognize the equitable doctrine of *forum non conveniens*.¹²¹ This doctrine allows the defendant to contest the plaintiff's choice of forum on grounds of substantial inconvenience, fairness and justice.¹²² The doctrine allows a court having adjudicative jurisdiction to decline exercise of its jurisdiction whenever the particular circumstances of the case establish that it would be inappropriate or unjust to hear the case.¹²³ As an equitable doctrine, trial judges are generally given wide latitude to consider "a legion" of factors in determining whether to dismiss an action *forum non conveniens*.¹²⁴

While it is logical to expect the doctrine of *forum non conveniens* to offer a useful shield to the non-resident author/publisher, the reality is that English courts have generally ignored the doctrine in the context of libel lawsuits. In *Berezovsky*, for example, the House of Lords reversed a lower court's determination that the Russian's libel suit should be dismissed *forum non conveniens*.¹²⁵ Lord Nolan, rejecting the lower judge's conclusion that the Russian's libel lawsuit had "no connection with anything which has occurred in [England]," and rejected *forum non conveniens* on the basis of the rather absurd conclusion that a lawsuit brought by a foreign citizen against foreign defendants challenging statements contained in an article researched and written and originally published thousands of miles away from the British empire was "solely concerned with the plaintiffs' reputations in England."¹²⁶ Lord Hoffman rightly

¹¹⁹ See *Spiliada Mar. Corp. v. Cansulex Ltd.* [1987] A.C. 460 (holding that doctrine of *forum non conveniens* requires plaintiff applying for extraterritorial service to establish that "England is the most appropriate forum to try the action.").

¹²⁰ See generally Martin J. McMahon, Annotation, *Forum Non Conveniens Doctrine in State Court as Affected By Availability of Alternative Forum*, 57 A.L.R. 4TH 973 (1987).

¹²¹ See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 274-76 (5th ed. 2006).

¹²² *Id.*

¹²³ See, e.g., *Spiliada Maritime supra* note 119 at 474.

¹²⁴ *Id.* at 465.

¹²⁵ See *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, 1017 (H.L.) (U.K.)

¹²⁶ *Id.*

noted, in dissent, that “the notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in esteem of persons in [England] who have heard of him is something which would be taken seriously only by a lawyer.”¹²⁷

After *Berezovsky* it would be foolish to depend on *forum non conveniens* in English courts. English judges, acting with the authorization of the House of Lords, are likely to give little deference to the interests of comity and convenience wrapped up in the doctrine. Because all three categories of typical libel tourists have reputations to protect in England the English courts are unlikely to dismiss the libel tourist’s claims.¹²⁸

C. Appear and Vigorously Contest the English Libel Action

If the American author has the time, money, and fortitude then she might consider appearing and contesting the English libel lawsuit. This option might be instinctively appealing assuming that the author has some support for her statements or believe her statements were expressions of protected opinions. After all, the mere allegation of libel or slander is potentially harmful to the credibility of the author. She may be tempted to appear and respond. There are, however, several significant reasons why this option will be unattractive to most American authors (even assuming their words are accurate and true).

First, putting up a legal defense in an English defamation action is a notoriously difficult, expensive, and risky endeavor even for sophisticated English defendants. English media defendants, for example, often settle defamation charges in an effort to avoid the complicated and expensive proceedings.

A central justification for such settlements is the fact that England’s defamation standards favor the plaintiff. If the plaintiff establishes publication of a statement which tends to harm the plaintiff’s reputation then the defendant must prove that

¹²⁷ *Id.* at 1023.

¹²⁸ There is one example of an undisturbed dismissal of an Internet libel lawsuit on grounds of *forum non conveniens*. See *Dow Jones & Co. Inc. v. Yousef Jameel*, [2005] EWCA Civ 75 (U.K.).

the statement is true to avoid liability. Contrast this with the U.S. approach requiring that the plaintiff prove falsity and malice. "That difference in the burden of proof can make all the difference."¹²⁹ Additionally, unlike an American defamation lawsuit, the English rule regarding attorneys' fees subjects the libel defendant to the threat of paying the libel plaintiff's attorneys' fees.

These disincentives to litigating the merits are compounded where the defendant is a foreign publisher. Litigating a case in a forum thousands of miles away is inconvenient (to say the least). The average American author will probably be challenged to finance a defamation defense. Without the support of their publisher the American author will, most likely, be unable to mount a vigorous defense in England.¹³⁰ The English defamation plaintiff, on the other hand, may be operating under a risk-free "no win, no fee" arrangement.

Then there is the reality of actually litigating the case. Although the English substantive law heavily tips the scales in favor of the defamation plaintiff, the American author might put up a successful defense. But this will only occur at great personal cost. Consider the example of Professor Lipstadt's successful defense in England. After years of litigation, a lengthy trial and multiple appeals, Professor Lipstadt successfully defended herself in English court against David Irving's defamation allegations. This "victory" was, by no means, cheap or easy.¹³¹ In addition to these costs, libel trials are often show tri-

¹²⁹ See LIPSTADT, *supra* note 7 at xx-xxi.

¹³⁰ The number of people involved in Professor Lipstadt's defense well illustrates the unlikelihood that one could mount a successful defense without substantial support. See *id.* at 307-10.

¹³¹ In the prologue of *History on Trial: My Day in Court with David Irving*, Professor Lipstadt summarizes the process of obtaining a defense verdict in England as follows:

For four years I prepared for this trial by immersing myself in the works of a man who exuded contempt for me and for much of what I believed. I lost many nights of sleep, worried that because of some legal fluke Irving might prevail. For ten weeks in the winter of 2000, I had to sit barely fifteen feet from him and silently listen as he openly expressed that contempt in front of a judge and the world media. My scholarly work was deconstructed and my attire, personality and personal beliefs were dissected in the press. Much of what was reported about me—for example, my age, sources of support, and political beliefs—was simply wrong. But I had no way of challenging it. Through the course of the trial, at the insistence of my attorneys, I did not give interviews

als attracting unwanted attention and invasions of the author's privacy.¹³²

An additional risk in appearing in the English lawsuit is that the American author may also be waiving the jurisdictional objections to the forum discussed above.¹³³ This risk could result in undermining the collateral jurisdictional attack proposed in this article. It is not certain that a U.S. court would be required to attribute finality to the jurisdictional determinations of the English court. However, if the American author appears and litigates the question of jurisdiction in England before its courts, it will be more difficult to collaterally attack the power of the English tribunal in a collateral proceeding.

Finally, the American author, by appearing in the English action, runs the risk of substantially increasing her financial exposure. Damages are capped in an English default judgment and the attorneys' fees are likely to remain low. In a contested action the fees will greatly increase and the damages will likely exceed the default judgment cap.¹³⁴ Unless the American author maintains assets in England, there is little practical incentive to appear other than the interest in defending the veracity of the

or testify in court. Though my words were at the heart of this struggle, I had to depend on others to speak for me. For someone who fiercely prized controlling her life—even when it was better not to—this was excruciatingly difficult.

Id. xx-xxi.

¹³² See NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 3 (1986)

Although trials for libel seldom attract as much attention as cases involving murder or sex, legal conflicts over reputation (which can, sometimes, include questions of sex and violence) often receive extensive publicity. In fact, law professor Leon Green once complained that "the highly publicized libel action today is a sort of show piece to attract attention to the court house and dress an ordinary personal injury action in "Million Dollar Old Lace" for the advertisement of the lawyers and of the party plaintiff."

¹³³ See *Baldwin v. Iowa State Men's Traveling Ass'n*, 283 U.S. 522 (1931) (holding that a federal court in Iowa must give binding effect to the judgment of a Missouri court despite the claim that the Missouri court lacked personal jurisdiction over the defendant because the question had been fully litigated in the Missouri forum).

¹³⁴ The cap on damages in default judgments is £10,000. One well-known English libel firm advertises libel verdicts ranging from £10,000 to £175,000. ENGLISH PEN AND INDEX ON CENSORSHIP, *THE IMPACT OF ENGLISH LIBEL LAW ON FREEDOM OF EXPRESSION* 15 (2009), available at, http://libelreform.org/reports/LibelDoc_LowRes.pdf (last visited Mar. 18, 2010).

author's own statements (which are called into question by the mere filing of the English defamation lawsuit).¹³⁵

Professor Lipstadt's vigorous and successful defense is admirable and worthy of much respect. It is unlikely, however, that many American authors will have either the ability or the desire to put up a similar fight. Indeed, many English libel plaintiffs know that American authors cannot or will not appear in England. Consider David Irving's own words:

A few years before filing the suit, Irving told a sympathetic audience that libel defendants are full of bluster upon learning they are to be sued. When they discover the onerous nature of fighting a libel suit in the United Kingdom, they "crack up and cop out." Irving may well have anticipated that I would decide this battle was not worth pursuing and would agree to settle with him by issuing some sort of apology or retraction of my words. I was, after all, five thousand miles away and had to mount a defense in a foreign country whose laws heavily favored my opponent. Lawsuits can be exceedingly long and exceptionally expensive.¹³⁶

There are actual financial, emotional and physical burdens thrown upon an American author or publisher who is sued for defamation in a foreign court. These costs are at least as chilling as the costs (and arguable more detrimental) than the burdens on speech precluded by *Sullivan*.¹³⁷ Nevertheless, for the reasons offered in Part III, these burdens cannot be avoided by simply declaring the foreign judgment unenforceable. Instead, U.S. courts should refuse enforcement only in those cases where the foreign court's assertion of power over the speaker violated due process. The best way for an American author or publisher to preserve this argument is to refuse to appear and collaterally attack the foreign default judgment.

¹³⁵ Although not explored in this article, it might be interesting to sue the foreign plaintiff for defamation in U.S. courts arguing that the foreign defamation action is harmful to the author's reputation for accuracy and veracity.

¹³⁶ LIPSTADT, *supra* note 7 at xxi (citation omitted).

¹³⁷ Russell L. Weaver, *Free Speech, Democracy and Enforcement of Foreign Defamation Judgments* (2010) (unpublished manuscript, on file with author).

D. Default and Collaterally Attack the Default Judgment in a U.S. Court

The next option is to ignore the English action and challenge recognition or enforcement of the foreign libel judgment if and when it is presented for recognition and enforcement in an American court. A civil judgment is of little concern until it is recognized or enforced in a forum having jurisdiction over the judgment debtor or the judgment debtor's assets. This defensive option has utility. However, there are two potential problems with this approach: (1) it is not entirely clear that American courts will refuse enforcement of the foreign libel judgment; and (2) what happens if the foreign libel plaintiff never presents the judgment to an American court for enforcement or recognition?

Some scholars forcefully argue that foreign libel judgments should never be enforced in American courts on the ground that such judgments offend an absolute American right to free speech.¹³⁸ This argument requires a court to view the First Amendment as interpreted by *Sullivan* as an absolute right throughout the world. In other words, rejecting foreign judgments on substantive grounds begs for a reasoned justification of the extraterritorial applicability and enforceability of the First Amendment.¹³⁹

¹³⁸ See, e.g., Weaver, *supra* note 138. ("It is difficult to argue that the U.S. should be willing to forfeit [*Sullivan* created] breathing space by enforcing free speech judgments from other countries, particularly defamation judgments from the United Kingdom. If the U.S. did enforce foreign defamation judgments, libel plaintiffs are likely to flock to other jurisdictions to bring suit, and the end result will be a circumvention of the *Sullivan* standards, and a chilling impact on free speech in the United States.") and Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis*, 18 LOY. L.A. INT'L & COMP. L. REV. 795, 807 (1996) (describing refused recognition and enforcement of foreign libel judgments as "constitutionally mandatory").

¹³⁹ This article does not attempt to articulate such an argument. Those who advocate rejection of foreign defamation judgments by relying on the First Amendment and *Sullivan* must defend the extraterritorial application of the U.S. Constitution or otherwise articulate a basis for denying the legislative and adjudicative prerogatives of the foreign sovereign. In articulating such a defense, advocates of the public policy position should consider cases where the American author intentionally directs defamatory speech into a foreign nation and publishes statements impugning the reputation of citizen of that nation. Certainly U.S. courts have an interest in protecting the speech rights of the American speaker, but the foreign nation also has an interest in protecting the reputa-

1. The General Approach to Recognition or Enforcement of Foreign Judgments in American Courts

Whether and to what degree foreign judgments are cognizable or enforced¹⁴⁰ is a basic and essential question of law. This question is of such fundamental import that the framers incorporated the Full Faith and Credit¹⁴¹ and Supremacy¹⁴² Clauses into the Constitution. These clauses require recognition and enforcement of judgments rendered by sister courts within the Union.¹⁴³ Although similar interests are implicated by international judgments, the constitutional conflicts clauses do not resolve the question of the force or effect of international judgments in U.S. courts.¹⁴⁴ In fact, the validity and effect of foreign judgments is a question of state law, despite the national interests implicated. Any domestic court presented with a libel judgment rendered by an international tribunal must therefore determine whether it is enforceable by application of state common law.¹⁴⁵

Determining whether a foreign judgment is entitled to recognition or enforcement usually begins with the principle of comity articulated by Justice Gray in *Hilton v. Guyot*.¹⁴⁶ There the Court announced the following general rule of comity:

tion of one of its citizens. Are advocates of the public policy position claiming that the United States is sovereign over speech everywhere in the world?

¹⁴⁰ There is an important distinction between recognition of foreign judgments and enforcement of foreign judgments. Judgments are legally *recognized* when they are used for res judicata or collateral estoppel purposes, while they are *enforced* only after entered as judgments in the forum. See, e.g., Jonathan H. Pittman, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969, 969-70 (1989).

¹⁴¹ U.S. CONST. art. IV, § 1.

¹⁴² U.S. CONST. art. VI.

¹⁴³ For a summary of the policies and interests served by these clauses, see RESTATEMENT (SECOND) CONFLICT OF LAWS § 117 (1971).

¹⁴⁴ See, e.g., *id.* at § 117 cmt. c.

¹⁴⁵ Surprisingly, there are no treaties or federal statutes establishing a national policy regarding the recognition and enforcement of international judgments. Under the auspices of the Hague Convention, extensive efforts to craft a multilateral treaty regarding the recognition of foreign judgments have been made. The United States initially took a leading role in these negotiations in an effort to secure agreement of foreign nations to recognize U.S. judgments abroad. However, efforts to draft a treaty stalled, in part, to disagreements regarding the scope of foreign libel judgments and regulation of the speech and commerce on the Internet. AM. LAW INST., *supra* note 22, at 1-6.

¹⁴⁶ *Hilton v. Guyot*, 159 U.S. 113 (1895).

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of the nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.¹⁴⁷

This rule encourages recognition of foreign judgments even where the foreign judgment does not mirror rights or remedies available in domestic courts. The wise purpose underlying the *Hilton* rule is the mitigation of international conflict by extending respect to co-equal sovereigns despite potential differences in substantive law. Most states have adopted the *Hilton* rule in their common law jurisprudence regarding recognition and enforcement of foreign judgments.¹⁴⁸ This pervasive application of the *Hilton* rule and the resulting liberal extension of comity to foreign judgments is reflected in section ninety-eight of the Restatement (Second) of Conflict of Laws: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned."¹⁴⁹

There are at least three public interests served by the policy favoring recognition of foreign judgments. First, recognition of foreign judgments serves the public's interest in finality of litigation.¹⁵⁰ Second, comity advances diplomatic interests which are broader than the private controversy before the court. Fi-

¹⁴⁷ *Id.* at 158.

¹⁴⁸ See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 98 cmt. c (1971).

¹⁴⁹ *Id.* For a good discussion of the Second Restatement's approach and underlying policies, see Mark D. Rosen, *Exporting the Constitution*, 53 Emory L.J. 171, 175-79 (2004).

¹⁵⁰ See RESTATEMENT (SECOND) CONFLICT OF LAW § 98 at cmt. b (1971).

nally, extension of respect for foreign judgments is vital to securing fair treatment of American judgments in foreign courts.¹⁵¹

There are two traditional exceptions to the general rule that foreign judgments are enforceable. First, judgments entered by courts lacking jurisdiction over the person or subject-matter are void and unenforceable. Second, a catch-all exception allows a court to refuse enforcement of foreign judgments on the basis they are repugnant to the public policy of the forum.

Historically, the public policy exception has been narrowly construed. U.S. courts have, instead, tolerated difference in substantive law and extended respect to the foreign judgment. Because refusal to recognize or enforce a foreign judgment is, at its core, a rejection of the sovereignty of the foreign tribunal, courts should be reluctant to refuse recognition on grounds of differing substantive policy. Refusal to recognize the adjudicative power of a foreign nation will impact diplomatic relations beyond the scope of the private dispute before the court. Even in the limited judicial context, the maxim "you've got to give respect to get respect" is here at play. If American courts blithely reject the judgment of foreign courts in matters of speech, then America should expect recognition of its judgments regarding other substantive matters in foreign tribunals.

2. Recognition and Enforcement of Foreign Libel Judgments

Despite the dangers implicit in refusing recognition of foreign judgments, some argue that First Amendment interests are so fundamental that American courts must refuse recognition of all foreign libel judgments unless the foreign tribunal extends First Amendment protections to the libel defendant. This argument has gained traction in both state and federal courts.

The best example is *Bachchan v. India Abroad Publications, Inc.*¹⁵² There, an English libel judgment creditor sued to

¹⁵¹ See, e.g., Arthur T. von Mehren, *Recognition and Enforcement of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601 (1961). See also *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 519 (explaining that the United Nations Convention requires contracting states to provide equal treatment of foreign judgments in their own courts).

enforce his English judgment in New York.¹⁵³ The trial judge determined that “if . . . the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be, ‘constitutionally mandatory.’”¹⁵⁴ After determining that the English libel judgment at issue was repugnant to the policy of free expression, the court refused to recognize the English judgment.¹⁵⁵

Another English libel judgment was presented for recognition and enforcement in *Matusevitch v. Telnikoff*.¹⁵⁶ Judge Urbina, citing *Bachchan*, held that Maryland law permitted rejection of the English judgment on grounds that the libel judgment was “repugnant to the public policies of the State of Maryland and the United States.”¹⁵⁷

Despite the fact that American courts have, historically, been reluctant to refuse recognition of foreign judgments on the basis of underlying conflict of laws,¹⁵⁸ these cases offer support to the American author/publisher’s argument that the foreign judgment should not receive recognition. However, as discussed in more detail in Part III below, there is controversy regarding non-recognition on grounds of conflicting speech policy.¹⁵⁹

¹⁵² *Bachchan v. India Abroad Publ’ns, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

¹⁵³ *Id.* at 662-63.

¹⁵⁴ *Id.* at 662 (citing David D. Siegel, 7B McKinney’s Consolidated Laws, Practice Commentaries [5304:1]).

¹⁵⁵ *Id.* at 665.

¹⁵⁶ *Matusevitch v. Telnikoff*, 877 F.Supp. 1 (D.C. Dist. Ct. 1995).

¹⁵⁷ *Id.* at 4.

¹⁵⁸ See, e.g., RESTATEMENT. (SECOND) CONFLICT OF LAWS § 117 cmt. c. (1971). (“The fact that suit on the original [foreign] claim could not have been maintained in a State of the United States does not mean that a judgment rendered on the claim in a foreign nation will necessarily be refused enforcement by the courts of that state. In fact, enforcement will usually be accorded the judgment except in situations where the original claim is repugnant to fundamental notions of what is descent and just in the State where enforcement is sought. Even in cases where a valid foreign judgment would not be enforced, it may nevertheless be recognized and held to conclude the parties as to the issues decided.”)

¹⁵⁹ See Mark D. Rosen, *Should Un-American Judgments Be Enforced?*, 88 MINN. L. REV. 783, 785 (2004) (“While [some] foreign judgments may well be ‘un-American’ insofar as they come from non-American polities and reflect political values that are at variance with American constitutional law, neither the foreign judgments themselves, nor their enforcement by an American court, is unconstitutional.”); Linda J. Silberman &

3. What happens if the Libel Tourist never attempts to Enforce the English Judgment?

One curious thing about libel tourists is that not all of them attempt to collect their English judgments in U.S. courts. For example, Mahfouz, despite obtaining a substantial default judgment in his action against Ehrenfeld, has not presented the judgment to any U.S. court for enforcement.

Such a situation leaves an American author/journalist in a precarious situation. In her testimony before Congress, Dr. Ehrenfeld described the uncomfortable situation:

In 2005 the British court granted Mahfouz a judgment by default, awarding him hundreds of dollars, and other sanctions. Until the New York legislature passed the Libel Terrorism Protection Act last May, I spent many sleepless nights worried that Mahfouz will try to enforce the English judgment against me in New York. His deliberate non-enforcement left it hanging over my head like a sword of Damocles which aggravated the chilling effects. Mahfouz also uses a dedicated website to advertise my judgment with more than 40 other names of those he threatened and sued in London. Mahfouz' [sic] suit has never been tried on the merit. Yet, the British judgment affected my ability to publish. The threat he wields over me and over others chilled American publishers, especially those with assets overseas, from publishing books containing information on terror financiers. Mahfouz also chilled my ability to travel to the U.K., lest I be arrested to enforce the British judgment against me. I run the same risk in Europe and in

Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 644 (criticizing *Telnikoff* on the ground that the court failed to identify sufficient U.S. interests in the private dispute warranting non-recognition on public policy grounds); Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1033-34 (1994) (criticizing *Bachchan* on the ground that "neither the United States nor New York has an interest in applying the Free Speech Clause [to the dispute between the parties], while England apparently does have an interest in applying its law of defamation.").

most Commonwealth states due to the reciprocal enforcement of judgments.¹⁶⁰

As this statement illustrates, the non-recognition shield is inadequate to completely remedy interference with expressive rights. Accordingly, some suggest more aggressive measures to combat foreign libel judgments. Perhaps the libel defendant should directly assault the foreign libel proceedings by filing a declaratory action in the U.S.

E. Direct Collateral Attack: Declaratory and/or Injunctive Relief in a U.S. Court

Rather than requiring the American author/publisher to wait for the libel tourist to come to town, some suggest that courts should entertain actions for declaratory relief and award the American author a judgment declaring the foreign libel judgment void.¹⁶¹ Such a declaratory judgment would then have preclusive effect in all U.S. courts thereby preventing domestic enforcement of the foreign judgment.

Ehrenfeld vigorously pursued this strategy.¹⁶² Her effort to obtain declaratory relief against Mahfouz demonstrates a significant impediment to this strategy: the challenge of obtaining personal jurisdiction over the foreign plaintiff.¹⁶³

¹⁶⁰ *Libel Tourism: Hearing on H.R. 6146 Before the Subcomm. on Commercial and Admin. Law of the H. Judiciary Comm.*, 111th Cong. (2009) (statement of Dr. Rachel Ehrenfeld, Director, American Center for Democracy).

¹⁶¹ See, e.g., Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 *FORDHAM L. REV.* 3073, 3133-35 (arguing that U.S. federal courts should protect American publishers from English defamation actions by declaring the foreign judgment unenforceable in U.S. courts).

¹⁶² See *Ehrenfeld v. Mahfouz*, No. 04 Civ. 9641 (RCC), 2006 WL 1096816 at *2 (S.D.N.Y. 2006). On December 8, 2004, prior to the entry of a final judgment in the English libel action against her, Ehrenfeld filed a civil action against Mahfouz in federal court seeking a declaration that the statements at issue in Mahfouz's English civil action "do not give rise to liability for defamation under the laws of the United States or New York State and that in fact under these laws the default judgment obtained from the English Court is unenforceable in the United States." *Id.*

¹⁶³ See *id.* Ehrenfeld filed her declaratory action against Mahfouz in the United States District Court for the Southern District of New York. See *id.*

No American court may enter declaratory relief until it first acquires personal jurisdiction over the foreign plaintiff. Due process requires the defendant in the declaratory action (the foreign libel plaintiff) to have sufficient minimum contacts with the forum state before the courts of that forum may enter a declaratory judgment against that person. This presents a substantial problem in the context of a declaratory action against the libel tourist because the prospective defendant is a foreign citizen pursuing a foreign judgment in a foreign court. In Ehrenfeld's case, for example, the Second Circuit held that New York could not exercise personal jurisdiction over Mahfouz because his contacts with the forum were insufficient to satisfy the *International Shoe* standard.¹⁶⁴

Four states have adopted legislation attempting to remove this jurisdictional impediment to declaratory relief. California,¹⁶⁵ New York,¹⁶⁶ Florida,¹⁶⁷ and Illinois¹⁶⁸ recently amended

¹⁶⁴ Ehrenfeld v. Mahfouz, 518 F.3d 102, 104 (2nd Cir. 2008).

¹⁶⁵ The California long-arm statute now provides:

The judgment includes recovery for a claim of defamation unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.

CAL. CIV. PROC. CODE §1716(c)(9) (West 2010).

¹⁶⁶ The New York libel long-arm statute provides as follows:

Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided: (1) the publication at issue was published in New York; and (2) that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

N.Y. CIV. PROC. LAW § 302(d) (McKinney 2008).

¹⁶⁷ The Florida long-arm statute now provides:

their long-arm statutes by adding new provisions specifically tailored to libel tourism disputes. These amendments authorize use of the states' long-arm power to subject the foreign libel plaintiff to jurisdiction in state court "to the fullest extent permitted by the United States constitution."¹⁶⁹ The intent is to authorize jurisdiction over the libel tourists in order to enable direct declaratory relief.

The critical problem with these legislative responses is that, as applied in many cases against foreign plaintiffs, personal jurisdiction will not exist. As discussed above, due process requires the plaintiff to point to sufficient contacts between the defendant and the forum establishing the defendant's purposeful availment of the benefits and burdens of the forum such that exercise of state jurisdiction over him does not offend traditional notions of fair play and substantial justice.¹⁷⁰ Where the only contact between the defendant and the forum is the service of papers related to the foreign litigation, then it is unlikely that the minimum contacts test has been satisfied.

The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the United States Constitution and the State Constitution.

FLA. STAT. §55.605(2)(h) (2009).

¹⁶⁸ The Illinois libel long-arm statute now provides:

The courts of this State shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of Illinois or, if not a natural person, has its principal place of business in Illinois, for the purposes of rendering declaratory relief with respect to that resident's liability for the judgment, or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to this Code, to the fullest extent permitted by the United States Constitution, provided: (1) the publication at issue was published in Illinois, and (2) that resident (i) has assets in Illinois which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in Illinois to comply with the foreign defamation judgment. The provisions of this subsection (b-5) shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to, on, or after the effective date of this amendatory Act of the 95th General Assembly.

735 ILL. COMP. STAT. 5/2-209 (West 2008).

¹⁶⁹ See *id.*

¹⁷⁰ See *supra* notes 64-72 and accompanying text.

Although not a libel tourism case, the Ninth Circuit's recent struggle with an analogous situation in *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme* provides some support for the argument that jurisdiction exists in a declaratory action brought against a libel tourist.¹⁷¹ In *Yahoo!* a fractured *en banc* court considered the question of personal jurisdiction in a suit brought by a U.S.-based online auction service provider seeking a declaration that a French judgment banning the sale of Nazi memorabilia was unenforceable.¹⁷² The court determined that exercise of personal jurisdiction over the French defendants in the declaratory action was justified because those defendants had previously sought the protection of California's laws by seeking enforcement of injunctive orders.¹⁷³

Compare Ehrenfeld's effort to obtain declaratory relief against Mahfouz with *Yahoo!*. Unlike the defendant in the *Yahoo!* declaratory action, Mahfouz had never sought relief from New York's tribunals. His only contacts with New York were: (1) the letter his attorney mailed to Ehrenfeld; and (2) the papers he served on her relating to his English lawsuit.¹⁷⁴ These contacts, according to the Second Circuit, were insufficient to satisfy the due process test.¹⁷⁵ This jurisdictional limitation appropriately constrains the power of the court to disputes where the forum has an expected and reasonable interest in the controversy.

Recent legislative efforts to broaden personal jurisdiction in order to obtain declaratory (or substantive) relief against the libel tourist are also constrained by the due process clause and therefore probably lack jurisdiction over libel tourists having no contacts with those states. This result may appear unfair or unjust as applied in disputes between the libel tourist and the American author/publisher. It is not wise, however, to ignore the broader jurisprudential landscape in an effort to protect the author or publisher. Much more is at stake:

¹⁷¹ 433 F.3d 1199 (9th Cir. 2006) (*en banc*).

¹⁷² *Id.* at 1201.

¹⁷³ *Id.* at 1211. Three judges in a special concurrence dissented from the majority's analysis. *Id.* at 1224 (Ferguson, J., concurring in the judgment).

¹⁷⁴ *Id.*

¹⁷⁵ *Ehrenfeld*, 518 F.3d at 104.

Whether foreign judgments are enforced affects not only the parties to the foreign lawsuit, but also the sovereign interests of the country that has issued the judgment, the interests of the country that is asked to enforce the judgment, and the stability of the international business and legal system. Due undoubtedly to this array of interests, a system of cooperation among countries has emerged with regard to the enforcement of foreign judgments.¹⁷⁶

These interests counsel against a rush to ignore foreign libel judgments on grounds that judgment rests on procedural and substantive safeguards, which fail to satisfy *Sullivan*.¹⁷⁷

As discussed below, much of the perceived unfairness in the libel tourism cases will be mitigated by collateral review of the foreign court's jurisdiction in the case. Many libel cases rest on random or isolated publication within the forum which would not support exercise of personal jurisdiction over the U.S. speaker. If Mahfouz is entitled to the protection of the due process clause in U.S. courts then so is Ehrenfeld. The following section explains why the jurisdictional response to libel tourism is a proper response.

III. WHAT SHOULD BE DONE TO COMBAT LIBEL TOURISM: A PROPOSED RESPONSE

Libel tourism cases do threaten First Amendment interests of American authors and publishers. If a libel lawsuit in Alabama chills speech in New York, then certainly a libel lawsuit in England has the same effect. However, unlike the conflict in *Sullivan*, the conflict presented by libel tourism cases is not resolved by any "supreme law of the land." Foreign libel cases generate a clash between co-equal sovereign nations (and the adjudicative authority of their respective tribunals), and this necessitates a different solution than that secured in *Sullivan*.

¹⁷⁶ Rosen, *supra* note 149 at 175-76 (citations omitted).

¹⁷⁷ See *Yahoo! Inc.*, 433 F.3d at 1228 (Ferguson, J., concurring) (noting that the foreign relations implications of the exercise of jurisdiction where a litigant seeks a declaration that a foreign judgment is unenforceable should require the court to abstain and "defer[] to the Executive and Congress to assess the foreign consequences of [invalidating a foreign judgment]" (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 707 (9th Cir. 1992))).

U.S. courts can no more demand England's adherence to the First Amendment than England can demand U.S. judicial adherence and recognition of its Public Order Acts.¹⁷⁸

The *Sullivan* standard is uniquely American and it has great merit.¹⁷⁹ Our polity is one that cherishes free, robust, and uninhibited debate, especially on matters of public import. But ours is not the only rational balance of speech, privacy, and reputation interests. England's substantive speech jurisprudence, while certainly in conflict with American jurisprudence, is not irrational. Unless it is conceded that there is a supreme international law, then it is not possible to demand English adherence to the American experiment.

The underlying power struggle at issue in the libel tourism cases is not a conflict that will be resolved by pre-emptive declaratory judgments or injunctions against the foreign proceedings. Even if Ehrenfeld, for example, obtained a declaratory judgment against Mahfouz before he obtained his English default judgment, in order to avoid many of the harms of the British litigation (i.e., threat of collection or enforcement in England, distress at the pending English proceedings) she would be required to present the U.S. declaratory judgment to an English court for recognition. It is highly unlikely that the English court would enforce the U.S. declaration. This spiraling battle between judges leads nowhere.

Instead of seeking a judicial solution to the problem, courts should return to the principles of judicial restraint embedded in the doctrine of comity. Although it is difficult to extend respect to foreign tribunals attempting to police the world and regulate substantive rights abroad, the jurisprudential principles underlying comity remain relevant and important. It would be wise, at least in U.S. tribunals, to treat the judgments of foreign courts as American judges would like their judgments to be treated. Accordingly, courts should not throw respect for foreign judgments out the window simply because a foreign judgment implicates speech.

¹⁷⁸ Public Order Act, 1986 cmt. 64.

¹⁷⁹ See GLASSER *supra* note 27, at xvi-xvii.

Private litigants with a reasonable expectation of First Amendment protection will not be left in the lurch. An American author or publisher whose contacts with the foreign forum are random, isolated, or incidental does not expect and has no reason to expect "being hauled into court there." Such authors or publishers are then shielded from abusive foreign judgments by the fundamental principle of due process. American courts should carefully scrutinize the jurisdiction underlying a foreign libel judgment and refuse recognition or enforcement where the foreign court's exercise of judicial power over the author or publisher violates due process. However, where the American author or publisher purposefully avails herself of the protections and benefits of the foreign jurisdiction, then there is no reason why the author or publisher should expect an American court to step in to protect the speaker from substantive liabilities arising in that jurisdiction.

This jurisdictional approach is consonant with traditional notions of comity. Justice Story's *Commentaries on the Conflict of Laws*, for example, views jurisdiction as a fundamental prerequisite to the necessity of extending comity to actions of foreign sovereigns.¹⁸⁰ In his words, a foreign judgment announced by a tribunal lacking judicial power is void.¹⁸¹ This premise still serves as the backbone to all conflicts between co-equal tribunals.¹⁸² Thus, if Mahfouz presented his judgment in a U.S. court, the court should deny enforcement, not on grounds of public policy, but rather on the ground that the English tribunal's attempt to exercise jurisdiction in the case violates Ehrenfeld's right to due process.

Importantly, this strategic focus on unreasonable assertions of adjudicative jurisdiction of foreign tribunals serves a shared interest in global judicial restraint. England's exercise of jurisdiction over Ehrenfeld and others like her clearly disrespects American adjudicative power as well as American constitutional law. However, the appropriate response must be one of judicial restraint rather than a broadening of judicial power. This strat-

¹⁸⁰ STORY, *supra* note 29, at §586.

¹⁸¹ See *id.*

¹⁸² See, e.g., RESTATEMENT. (SECOND) OF CONFLICT OF LAWS § 24 cmt. e. (1971).

egy would properly call attention to the power struggle underlying all substantive conflicts rather than focusing the world on one example of conflicting substantive law.

Some will argue that this approach leaves many American authors and publishers in a precarious position because they hold assets in England or are targeting the English market. The jurisdictional shield will be of no use to the author or publisher whose contacts with England are sufficient to satisfy due process. I accept this criticism as valid, but offer two responses.

First, short of conquering England, American legislators or judges may not ignore England's sovereignty. England has the sovereign right to regulate speech within its borders. If a U.S. citizen travels to London and begins distributing material denying the holocaust in the middle of Trafalgar Square, then most would concede England's right to regulate the speech of the U.S. citizen. Why? Because the speaker is physically present within the realm of England's territorial jurisdiction. A U.S. court's subsequent refusal to enforce a libel suit resulting from the American's speech activities in Trafalgar Square would be tantamount to granting all American citizens extraterritorial immunity from all foreign speech regulations which fail to conform with *Sullivan*.

Second, England's regulation of speech, if properly constrained, will encourage authors and publishers desiring greater protection of their expressive rights to locate themselves in the United States. Careful authors and publishers would locate all their assets in the United States and publish only within the United States. These authors and publishers might consider withdrawing completely from the English market in an effort to avoid oppression of speech rights. English citizens would sense the implosion of the English media and rightly demand recognition of greater substantive protections for authors and publishers. There are already calls for such change in England. If such changes are not adopted, then authors and publishers should not subject themselves to the sovereignty of the foreign nation.

In U.S. courts, then, American authors or publishers should not be granted offensive weapons with which they may collaterally attack the authority of the foreign tribunal. Instead, courts should carefully scrutinize the jurisdiction of the foreign court

when a foreign libel judgment is presented for recognition or enforcement. If the foreign tribunal's exertion of power is inconsistent with *International Shoe* and its progeny, then the reviewing court should reject the foreign judgment on jurisdictional grounds.¹⁸³ However, if the foreign tribunal's jurisdiction is established, then the reviewing court should enforce the foreign judgment in the shared interest of comity between nations.

In addition to this judicial response, Congress should adopt comprehensive legislation regarding the recognition and enforcement of foreign judgments. Foreign libel judgments are one piece of a much larger issue. The recent international financial crisis, the threat of international terrorism, and the problem of international piracy are three clear examples of the increasing interconnectedness of co-equal sovereign nations.

Previous efforts in the Hague Conference to achieve international consensus on the recognition of foreign judgments were derailed when dispute emerged regarding the strict liability regime in American products law. This controversy illustrates the danger in accepting a policy-based refusal to recognize foreign judgments effecting speech rights. Americans injured by products produced in foreign nations and directed into the American market might confront similar policy-based objections to the American tort judgment when it is presented for collection in the foreign court. It is important to secure the enforcement of American judgments abroad. The path to this goal does not be-

¹⁸³ It is important to note that this suggested jurisdictional review should be more rigorous than ordinary review of libel jurisdiction over non-residents. In *Calder*, the Court noted that one reason First Amendment concerns were ignored in the jurisdictional effects analysis was the fact that both states were bound by the First Amendment. See 465 U.S. at 790-91. This, the Court explained, ensured that First Amendment interests would be protected even if the Florida defendants were subjected to jurisdiction in California. *Id.* Because there is no guarantee of First Amendment protection in libel tourism cases, the reviewing court should consider the non-recognition of procedural protections for speech as a ground for denying the foreign court's effort to claim jurisdiction solely on the basis of the effects of speech. This limitation would ensure non-recognition of most cases where the U.S. author's or publisher's contacts with the foreign forum are limited to the effects of speech published outside the forum. This would protect speech originally published in the United States from foreign regulation.

gin with a federal statute precluding enforcement of foreign libel judgments.¹⁸⁴

Thus, rather than adopting isolated non-recognition statutes such as the Free Speech Protection Acts, currently receiving hearing in Congress, legislators should begin working toward the adoption of a comprehensive federal statute regarding the recognition and enforcement of foreign judgments. The ALI's recently proposed federal statute is an excellent starting point for this discussion.¹⁸⁵

Congress should not adopt even more aggressive standards authorizing American citizens to sue foreign libel plaintiffs in federal court. First, such legislation would most likely be unconstitutional as applied to many foreign litigants due to the problem of acquiring jurisdiction over them. Second, such legislation directly impedes diplomatic efforts to obtain recognition and enforcement of American judgments. Third, such legislation improperly places in the hands of federal trial judges matters implicating the foreign relations of the United States.

Rather than pursue this strategy, Congress should work with the President to vigorously pursue diplomatic solutions to the problem of libel tourism. Because England's courts have become the haven of most libel tourists, a bilateral solution seems like a potentially viable response. Arguably, the recent explosion of the libel tourism industry in England resulted from the House of Lord's decision in *Berezovsky*. English jurists, scholars, and citizens have criticized the result in *Berezovsky*. Is it possible to reach agreement regarding adjudicative jurisdiction with England in a manner that would protect American authors and publishers? Based on the increasing level of criticism in England, it seems quite possible to reach a diplomatic solution.

In addition to these efforts, the State Department should be encouraged to renew its efforts to achieve multilateral solutions

¹⁸⁴ See Rosen, *supra* note 149, at 232 ("The categorical refusal to enforce [foreign libel] judgments harms plaintiffs that have prevailed abroad, undermines the ability of foreign countries to advance political commitments that diverge from American constitutional values, and creates needless costs and uncertainty for the international community.").

¹⁸⁵ See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2005).

to the recognition and enforcement of foreign judgments. Recognition and enforcement of judgments is a fundamental issue of law and in an increasingly globalized world there must be renewed effort to secure recognition and enforcement of judgments issued by tribunals having adjudicative authority. The international rule of law depends on it.

CONCLUSION

The desire to confront abusive foreign libel judgments is understandable. It is clear that such foreign lawsuits impinge upon expressive rights protected by the First Amendment. It is difficult to read of Professor Lipstadt's experience and simply shrug it off. It is also not hard to sympathize with Dr. Ehrenfeld, whose efforts to bring public exposure to matters of significant public concern resulted in an English judgment against her.

This article is intended to highlight, not diminish, the import of such abusive foreign libel judgments. These judgments are part of a greater and ongoing struggle to secure expressive rights around the globe. It is therefore tempting to encourage state and federal judges as well as members of Congress to respond and declare void all foreign defamation judgments.

This article is premised, however, on the maxim that one should not win the battle and lose the war. In their effort to protect expressive rights in individual cases by denying enforcement or declaring foreign judgments generally void, U.S. policymakers and judges would actually be expanding the adjudicative power of judicial tribunals around the world. Such an expansion of judicial authority may actually diminish U.S. expressive rights abroad.

Ironically, libel tourism suits highlight a global effort to suppress speech and draw needed attention to the importance of expressive rights. These suits have resulted in criticism around the world. Rather than using the resulting momentum generated by criticism only to increase judicial intervention, our policymakers should use this opportunity to pursue diplomatic solutions, which would secure greater protection of expressive rights and recognition of U.S. judgments throughout the international community.

CONVENTIONAL LOGIC: USING THE LOGICAL FALLACY OF DENYING THE ANTECEDENT AS A LITIGATION TOOL

*Stephen M. Rice**

INTRODUCTION

Lawyers are governed by rules. Rules control us. Rules affect virtually every aspect of our profession. Rules govern our admittance to law school. Rules dictate the attendance policy of our first law school class and how we take our final set of law school examinations. American Bar Association rules and standards direct the operation of our law schools. A rule requires lawyers mark their answers to the multistate bar examination with “number 2 black lead pencils.”¹ There are rules we follow to apply for and to be admitted to the bar. Once admitted, rules of professional conduct codify our ethical and professional responsibilities.

Rules of court, local, state, and federal, dictate everything from the number of pages in the complaint we file, to the amount of time for appealing a judgment. Rules of law, common and statutory, make up the substance of our expertise. Rules of evidence dictate the questions we can ask in the courtroom and the answers each juror is allowed to hear. These jurors hear our cases and are instructed on the rules of law. Rules govern the details of their decision-making process, beginning with the number of them in the jury panel to the timing of when their verdict is embodied in the form of a judgment. Even the bounty of our harvest is influenced by rules, as the fees attorneys are

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¹ The National Conference of Bar Examiners indicates that those taking the Multistate Bar Examination bring “several No. 2 black lead pencils or mechanical pencils with HB lead.” THE MULTISTATE BAR EXAMINATION 2010 INFORMATION BOOKLET 6 (2010), *available at* http://www.ncbex.org/uploads/user_docrepos/MBE_2010.pdf (last visited Feb. 24, 2010).

paid for the provision of legal services are subject to local, state and federal income tax rules.

However, there is a set of rules that serves at the foundation of all of these various laws, regulations, and legal principles that few lawyers study or even know of. These rules have existed forever and been recognized for centuries. They have been studied, refined, debated, discarded, and rediscovered. Philosophers, theologians, scholars, lawyers, and judges have quoted them. Over the course of the centuries of jurisprudence of this country, these rules have served as the substantive bases for judicial decisions, without the knowledge of the judges. Lawyers have lost cases because of these rules, but had no idea that the rules were dispositive of their arguments or considered by the judge. When judges have been frustrated by lawyers' arguments, these rules were waiting to explain those arguments away, but the judges did not know about them. Litigants have had their cases decided by these rules, but never understood the rules, how they are applied, or the role they had in the success or failure of their claims or defenses.

These rules are the philosophical rules of logic. Hundreds of years ago, they were the essential weapon of those who spoke in the public square, the "rules of court" for philosophers in search of truth, and the structure of reasoning for theologians and scholars for many years.² However, in modern society, lawyers,

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Classical rhetoric was the dominant discipline for developing legal arguments from the fifth century B.C. until the first quarter of the nineteenth century. Classical rhetoric was the methodology that ancient Roman and Greek orators used to harness the power inherent in language. Rhetoric was epistemic as well as persuasive. Epistemic rhetoricians used language to find truth—as in the Socratic dialogues. Persuasive rhetoricians used the intricacies of language to persuade an audience of an already discovered truth or, in the case of the Sophists, a probability or possibility. Legal rhetoric—termed *apologia*, or defense—was a combination of epistemic and persuasive rhetoric. . . .

Legal orators used the methods of these five canons to appeal to a jury's sense of *ethos*, *pathos*, and *logos*. These three appeals, or modes of proof, often worked together and will be addressed at greater length in the analysis of the two cases at hand. *Ethos* deals with how the speaker represents himself and his client, *pathos* deals with how the speaker appeals to his audience, and *logos* deals with the logic of the words themselves and how the speaker interacts with the audience.

those charged with the task of professional argumentation, rarely know these laws exist, what they mean, or how they can be an important tool in solving legal problems, diffusing wrong legal arguments, and explaining why some arguments are right and others are wrong.

Logic has been described as “the study of the methods and principles used to distinguish correct from incorrect reasoning.”³ While we regularly evaluate correct and incorrect conclusions, we rarely give much thought to the details of exactly why an arguer’s methods for reaching that conclusion are correct or incorrect. We give little thought to the methods we use to craft or evaluate our, or others’, arguments. Similarly, we do not always understand why these methods are good or bad, reliable or unreliable, persuasive or unpersuasive. While we might have an intuitive sense of whether an argument is correct, we do not always understand the rules that prove why it is correct. One idea might seem to us to support another, or at the very least be consistent with another, but proving or disproving whether one truth necessarily implies another, requires that we understand that when it comes to apparent relationships between two concepts, things are not always as they appear. Instead, in order to evaluate the validity of inferences, we must know something

Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 *BYU Educ. & L.J.* 299, 307-08 (2003) (footnotes omitted).

³ IRVING M. COPI & CARL COHEN, *INTRODUCTION TO LOGIC* 4 (13th ed. 2009). Philosophers have otherwise defined logic, have debated what logic is, and described what makes logic “formal” or “informal.” For example, it has been said that “[l]ogic, in the most extensive sense in which it has been thought advisable to employ the name, may be considered as the Science, and also as the Art, of Reasoning.” RICHARD WHATELY, *ELEMENTS OF LOGIC* 1 (Boston, James Munroe & Co. 1858). “Formal Logic is a propaedeutic which is abstractly concerned with consistency of reasoning without any reference to the truth or the falsehood of the accepted premises, or to the knowledge or the ignorance of the reasoner.” W. R. BOYCE GIBSON, *THE PROBLEM OF LOGIC* 157 (1908). “Pure or Formal Logic is the science of the necessary laws of thought. It has *thought* rather than *language* for its adequate object-matter; for though it must express itself in language, and is very much concerned with it, language comes in only as the minister of thought. It is a *science*;—a science rather than an *art*.” J. LACY O’BYRNE CROKE, *LOGIC* 2 (Robert Sutton 1906) (footnote omitted). “[F]ormal logic is devoted to thought in general and those Universal forms and principles of thought which hold good everywhere, both in judging of reality and in weighing possibility, irrespective of any difference in the objects.” HERMANN LOTZE, *LOGIC IN THREE BOOKS OF THOUGHT, OF INVESTIGATION, AND OF KNOWLEDGE* 10-11 (Oxford, Clarendon Press 1884).

about the rules of logic, which tell us what inferences are correct and what inferences are not.

Logic, a branch of philosophy, has considered the structure of argument and developed rules and principles that ensure the logical integrity of argument and provide a basis for explaining logical integrity or lack thereof.⁴ These rules and principles of logic not only provide a basic structure confirming how people make sound logical decisions and proper inferences, but they also provide a reliable system for testing the nature and integrity of legal and other arguments. Historically, as doctrines of philosophical logic developed, they were refined and became more complex. However, in the same way a hornbook or legal treatise summarizes a particular area of law and makes hundreds of years of jurisprudence and thousands of legal decisions on a particular legal subject simple, clear, consistent and cogent, philosophy has provided a simplified "shortcut" to testing logical validity: a convention called the logical fallacy.

Logical fallacies are certain patterns of argument that reveal a faulty logical structure. It is this faulty pattern of logical structure that makes the fallacy apparent to someone evaluating the argument. It is the fallacious pattern that makes the logical fallacy a valuable tool for lawyers. This tool is most valuable where an argument might appear logical on its face,

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In a very common ordinary-language usage, "logical" is in effect an honorific adjective roughly equivalent to "reasonable, sensible." "There has to be a logical explanation," we say, meaning "there has to be a reasonable explanation"; and "that's logical," meaning "that makes sense." . . . But in an old philosophical tradition going back at least to Aristotle, logic has been conceived as a theoretical discipline: the theory of whatever is good in the way of reasoning. Logic, so understood, is a normative enterprise—as distinct, most importantly, from a descriptive study of how people actually reason. "Good," in such a theory, is focused on the avoidance of contradiction and on validity, the capacity of an argument to preserve truth—as distinct, most importantly, from its persuasiveness to this or that audience. In this usage, "logic" encompasses both systematic, formal representations of valid arguments and theorems, and informal, philosophical explorations of such concepts as *term*, *proposition*, *argument*, *truth*, etc.

See Susan Haack, *On Logic in the Law: Something, But Not All*, 20 *RATIO JURIS* 1, 9-10 (2007).

but in fact is necessarily and uncontrovertibly illogical.⁵ Lawyers mastering these logical fallacies will have an important weapon at their side. While most judges will agree that arguments in their courtroom must be reasoned and logical, few lawyers have a sophisticated understanding of exactly what makes a legal argument logical or illogical. The logical fallacy provides a mechanism for explaining why the argument must fail even to those unschooled in philosophical logic.

While one might think that lawyers are skilled in logic and that lawyers should be able to identify logical arguments from illogical ones at a glance, this is not the case. The problem is not that lawyers are unfamiliar with logic. To the contrary, lawyers know logic. They even believe it is important. Logic comes naturally. Logic is indispensable and inescapable. Our ability to use logic to reason to conclusions, make decisions, and act “reasonably” is essential to our ability to function, not just as lawyers, but as members of society. Cicero described:

[A] true law, *a right reason*, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation.⁶

⁵ “A fallacious argument, as almost every account from Aristotle onwards tells you, is one that *seems to be valid* but is *not so*.” CHARLES L. HAMBLIN, *FALLACIES* 12 (1970). For a thorough discussion of the meaning of fallacy throughout the history of the philosophy of logic, see H. V. Hansen, *The Straw Thing of Fallacy Theory: The Standard Definition of ‘Fallacy’*, 16 *ARGUMENTATION* 133 (2002).

⁶ MARCUS TULLIUS CICERO, *DE RE PUBLICA* (51 B.C.), reprinted in 3 C.J. DE VOGEL, *GREEK PHILOSOPHY: A COLLECTION OF TEXTS WITH NOTES AND EXPLANATIONS* 177 (3d ed., Brill Academic Publishers 1977) (emphasis added). While Cicero’s topic here was something more comprehensive than just logic, his focus on “reason” is significant here. One author has described “natural law reasoning” this way:

According to Coke, law is the summation of reason, and the realization and perfection of rational action. Cicero agrees: the life of the law has been reason. However, the reasoning of the common law is a special kind: it is a practical reasoning (*phronesis*) acquired through years of diligent study. Reason is the motive force of the rule of law, and one must understand the rationale behind the rule of law to appreciate and apply that rule correctly. This is what is meant by natural law reasoning.

The laws of logic, at some level, constantly bombard us. Whether we are making a pot of coffee, driving to the office, reading this paragraph, writing a brief in support of a motion for summary judgment, or considering Werner Heisenberg's Uncertainty Principle, we are engaged in logic.

For lawyers, it is not enough merely to step out, knee-deep in the waters of logic. Instead, lawyers should wade out, at least to their waists if not up to their necks. For lawyers, beginning on the first day of law school, they set out to "think like a lawyer." It is their exercise in logical analysis that transforms their brains from what Professor Kingsfield described as "mush"⁷ to skillful, efficient, legal problem-solving organs. However, the lessons of centuries of philosophy considering the truth, power and limits of logic has, for many lawyers, been reduced to concepts like "IRAC," "FORAC," and "CRAC."⁸ While these summaries are helpful methods for neophytic legal problems solvers to learn the process of legal reasoning and to see, by example, how lawyers solve legal problems, they provide virtually none of the philosophical underpinnings of logical analysis. The logical analysis respected by lawyers and judges is a discipline that, at its heart, remains in many ways unchanged

Dr. Jur. Eric Engle, *Death Is Unconstitutional: How Capital Punishment Became Illegal in America—A Future History*, 6 PIERCE L. REV. 485, 489 (2008) (footnotes omitted).

⁷ Today's law school students infrequently see the 1973 movie *The Paper Chase* before their first day of law school. In it, the fictional Harvard Law School Professor, Professor Charles Kingsfield, tells his class, "You come in here with a skull full of mush and you leave thinking like a lawyer." *THE PAPER CHASE* (Twentieth Century Fox 1973).

⁸ "The IRAC acronym stands for Issue, Rule, Application, and Conclusion. It is probably the most widely known of the acronyms describing conventions for organizing a legal analysis. Many books or popular courses on law school exam-taking tips suggest that using the acronym will increase performance on law school exams." Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking about Legal Writing*, 85 Marq. L. Rev. 887, 898 n.50 (2002). "[L]egal writing teachers and texts have offered alternatives like CRAC (Conclusion, Rule, Application, Conclusion) or FORAC (Facts of precedent case, Outcome of precedent case, Rule, Application, Conclusion)." *Id.* at n.51. See also James Ottavio Castagnera, *Why the Nation Needs More Lawyers*, 22 T. Marshall L. Rev. 19, 26 (1996) ("IRAC is to legal analysis what 'Force = Mass x Velocity' is to Newtonian physics"). See also Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, 39 Loy. U. Chi. L.J. 123, 129-30 (2007) (describing IRAC, as a "positive" teaching tool and recognizing that "[t]hrough positive teaching tools, 1Ls learn the many different ways that legal analysis can go right, but see fewer contrasting varieties of how their own legal analysis is likely to go wrong").

from the lessons and writings of Aristotle and others who for more than 2000 years studied, tested, and practiced formal logic as an indispensable tool for evaluating and solving social, moral, and legal problems.⁹

Instead of understanding the nomenclature, nature, or philosophical bases of formal logic, lawyers typically consider logic on a pragmatic but superficial level. Lawyers have taken the driver's seat of the logic car but do not care to inspect the oil or change the air filter themselves. They are content to drive about and wash and wax the exterior. They will watch their adversaries drive past too. And while they are quick to point out an obvious scratch on opposing counsel's rear quarter panel, they rarely take the time to release the hood, inspect the spark plugs, and determine whether the inner workings of opposing counsel's argument are properly firing on all cylinders.

It is hard to imagine that lawyers are trained to be such good drivers, and to drive such expensive machines, without any formal training in how to check the oil, much less change it. More concerning is that lawyers frequently do not seem to be occupied with how these machines work. Instead, they frequently follow logical instinct or hunch,¹⁰ concluding that, based on the lawyer's perception of the way things sound and appear, all of the components are operating properly. Worse yet, they simply assume, at their own peril, that the oil is clean and plentiful and the spark plugs have not been fouled. Instead of identifying what is wrong with their opponent's argument, they assume it is right, and instead argue that their own argument should be accepted because it is somehow "better" than the other. When it comes to evaluating logic, lawyers are more com-

⁹ Philosophical logic has been said to originate with the Greek philosopher Parmenides (510-440 BC) and his student Zeno of Elea whose arguments begin with a premise accepted by the audience he attempted to persuade and derive conclusions that his audience would recognize as impossible. In the fifth century BC, professional teachers of oratory called Sophists who further developed the art of argumentation. However, it was not until Aristotle (384-322 BC) that a systematic, formal philosophy of logic was developed. Robin Smith, *Ancient Greek Philosophical Logic*, in *A COMPANION TO PHILOSOPHICAL LOGIC* 12-23 (Dale Jacquette ed., Wiley-Blackwell 2002).

¹⁰ See Mark C. Modak-Truran, A Pragmatic Justification of the Judicial Hunch, 35 U. Rich. L. Rev. 55, 57 (2001) (discussing the "hunch theory of judicial decision making").

fortable relying on their own perceptions than utilizing philosophy's efficient and enduring principles.

Before we blame lawyers for their lack of knowledge of or interest in formal logic, we should admit that they are frequently unschooled in these matters. Law school students typically have undergraduate degrees in political science, business, English, history, psychology, and criminal justice. Few lawyers have significant formal training in philosophy anymore, much less formal logic.¹¹ Law schools have a difficult enough time finding space in the curriculum to teach core subjects matter and basic lawyering skills, much less the seemingly esoteric subject of formal logic. Accordingly, judges and lawyers struggle when it comes to explaining and understanding why the logical form of an argument requires any argument's failure.

This article will explain how philosophical logic provides a ready tool for advocates to use in evaluating legal arguments in the convention of the logical fallacy. Specifically this article will address one logical fallacy known as Denying the Antecedent by explaining what philosophical logic is, what a logical fallacy is, and how to identify the Fallacy of Denying the Antecedent. Furthermore, the article will provide some examples of the appearance of the Fallacy of Denying the Antecedent in cases and how courts use the Fallacy of Denying the Antecedent to reject legal arguments on the basis that they were not logically valid. Last, the article will provide some guidance for litigators in identifying, exposing, and convincing courts to reject legal arguments that are based on the Fallacy of Denying the Antecedent.

¹¹ For a discussion of law school students' undergraduate disciplines and their respective deductive reasoning skills, see Mark Graham and Bryan Adamson, *Law Students' Undergraduate Major: Implications for Law School Academic Support Programs (ASPs)*, 69 UMKC L. REV. 533, 551-52 (2001). The authors analyzed the performance of a group of law school students on deductive reasoning problems. In the study, students with undergraduate degrees in math, engineering or philosophy performed better than students with undergraduate degrees in English, history or political science. Students with political science undergraduate degrees performed the worst. *Id.*

I. FORMAL LOGIC AND LOGICAL FALLACY ARE CONCEPTS THAT ANALYZE LOGICAL STRUCTURE OF ARGUMENT

Identifying these patterns of fallacious reasoning begins with understanding of philosophic logic. Philosophy recognizes different systems of logic. One commonly used system of logic found in legal argument is deductive logic.¹² Deductive logic lends itself to analyzing arguments in syllogisms. A syllogism is a persuasive¹³ argumentative structure of deductive logic. A syllogism is made up of two distinct, but related, premises and a conclusion of the deductive argument. We organize arguments this way naturally.¹⁴ There are different types of syllogisms. One common syllogism used in legal argumentation is a categorical syllogism, where the argument is based on the relationship between the concepts in the premises and the concepts' membership in certain categories.¹⁵ For example, when a legal issue revolves around whether a certain act meets a statutory definition, it may take the form of a categorical syllogism. Simi-

¹² Deductive argument makes the claim that the argument's conclusion is required by the truth of its premises. That is, a deductive argument is one where the premises, if true, ensure that the conclusion must be true. See COPI & COHEN, *supra* note 3, at 26. Legal argument does not always take the form of deductive logic. Contrast this with inductive reasoning. Arguments based on inductive reasoning do not ensure the truth of their conclusion. Instead, inductive legal reasoning makes the claim that the conclusion is merely probable, not conclusive, in light of the truth of its premises. *Id.* Frequently, lawyers make inductive arguments but claim that their arguments compel their conclusion. Legal argument takes many different forms, and much has been written in attempts to describe the nature of the legal reasoning process. These arguments go beyond the scope of this article. However, it is important to recognize that lawyers frequently make inductive arguments that, either explicitly or impliedly, claim that their conclusion is required by the truth of the argument's premises. In fact, logic teaches us that such arguments are not so compelling.

¹³ Justice Antonin Scalia and Brian Garner in their recent book suggest that lawyers "think syllogistically" and observe that "[t]he most rigorous form of logic, and hence the most persuasive, is the syllogism." JUSTICE ANTONIN SCALIA & BRIAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 41 (2008).

¹⁴

[P]ersuasion is possible only because all human beings are born with a capacity for logical thought. It is something we all have in common. . . . If you have never studied logic, you may be surprised to learn—like the man who was astounded to discover that he had been speaking prose all his life—that you have been using syllogistic reasoning all along.

Id. at 41.

¹⁵ COPI & COHEN, *supra* note 3, at 301.

larly, when a legal issue focuses on whether a party met the requirements of a term of a contract, that issue may take the form of a categorical syllogism. Consider this example of a categorical syllogism, in the context of a legal definition:

1. All manifestations of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made, are promises.¹⁶
2. The Defendant manifested an intention to act in a specified way, so as to justify the Plaintiff in understanding that a commitment had been made.
3. Therefore, the Defendant made a promise.¹⁷

Another type of common syllogism is the disjunctive syllogism. The disjunctive syllogism "contains a compound, disjunctive (or alternative) premise asserting the truth of at least one of two alternatives, and a premise that asserts the falsity of one of those alternatives."¹⁸ Consider this example of a disjunctive syllogism:

1. A contract is either a unilateral contract or a bilateral contract.¹⁹

¹⁶ RESTATEMENT (SECOND) CONTRACTS §2(1) (1979) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

¹⁷ In this example, the structure of the syllogism is more readily apparent if we reduce its components to symbols. If we assign the term "all manifestations of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made" the letter "A" and assign the term "promises" the letter "B" and assign the term "defendant" the letter C, then the form of the categorical syllogism can be represented this way:

All A's are B.

C is A.

Therefore, C is B.

¹⁸ COPI & COHEN, *supra* note 3, at 301.

¹⁹ Traditional analysis of the bargaining-process-developed dichotomy between 'bilateral' and 'unilateral' contracts. In forming a bilateral contract each party makes a promise: the offeror makes the promise contained in the offer, and the offeree makes a promise in return as acceptance. For example, a buyer offers to pay the price thirty days after delivery in return for the seller's *promise* to deliver apples. In forming a uni-

2. The contract is not a unilateral contract.
3. Therefore, the contract is a bilateral contract.²⁰

A third type of syllogism is the hypothetical syllogism.²¹ The hypothetical syllogism contains “one or more compound, hypothetical (or conditional) propositions, affirming that if one of its components (the antecedent) is true then the other of its components (the consequent) is true.”²² Legal arguments frequently employ hypothetical syllogisms.²³ The most commonly encountered form of hypothetical syllogism is the mixed hypothetical syllogism: “a syllogism that has one conditional premise and one categorical premise.”²⁴ For example:

lateral contract only one party makes a promise: the offeror makes the promise contained in the offeror, and the offeree renders some performance as acceptance. For example, a buyer offers to pay the price thirty days after delivery in return for the seller’s delivery of apples. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS, §3.4, at 205 (4th ed. 2004) (citations omitted).

²⁰ Once again, in this example, the structure of the syllogism is more readily apparent if we reduce its components to symbols. If we assign the term “unilateral” the letter “A” and assign the term “bilateral” the letter “B” the disjunctive syllogism can be represented this way:

A or B

Not A

Therefore, B.

²¹ The examples of hypothetical syllogisms found in this article are actually “mixed hypothetical syllogisms,” a subset of hypothetical syllogisms. A mixed hypothetical syllogism is made up of a conditional premise (an “if . . . then” proposition) and a categorical premise (a proposition that puts its subject into a category). In contrast, a “pure hypothetical syllogism” is comprised of two conditional propositions. As legal arguments frequently fall within the category of mixed hypothetical, and for purposes of consistency, this article will refer to mixed hypothetical syllogisms generically as hypothetical syllogisms. COPI & COHEN, *supra* note 3, at 301.

²² *Id.*

²³ See, e.g., *Iams v. DiamlerChrysler Corp.*, 883 N.E.2d 466, 492 (Ohio Ct. App. 2007); *Edwards v. Riverdale Sch. Dist.*, 188 P.3d 317 (Or. Ct. App. 2008); *Crouse-Hinds Co. v. Internorth, Inc.*, 634 F.2d 690, 703 (2d Cir. 1980); *Zinpro Corp. v. Ridenour*, 1996 Tex. App. LEXIS 3380 (Tex. App. Aug. 1, 1996), discussed *infra* at 16-24.

²⁴ COPI & COHEN, *supra* note 3, at 299. The mixed hypothetical syllogism is “mixed” because it contains only one hypothetical premise. The other premise is a categorical one. Therefore, it is a mixed hypothetical syllogism. This type is contrasted with a pure hypothetical syllogism, which would include two hypothetical premises.

1. If the subject of a contract is the sale of an interest in land, then the contract is within the Statute of Frauds.²⁵
2. The contract is a contract for the sale of an interest in land.
3. Therefore, the contract is within the Statute of Frauds.²⁶

Within this class of syllogism we find the Fallacy of Denying the Antecedent. The Fallacy of Denying the Antecedent takes a similar, but logically different, form from that of a well-formed hypothetical syllogism. For example:

1. If the subject of a contract is a transfer of an interest in land, then the contract is within the Statute of Frauds.²⁷
2. The contract is within the Statute of Frauds.
3. Therefore, the contract is a contract for the transfer of an interest in land.²⁸

Understanding the nature of this logically fallacious argument and why it is logically incorrect requires an understanding of the rules governing validity of hypothetical syllogisms.

Each category of syllogism must meet a few logical rules in order to be deductively valid. If the form of the syllogism is bad,

²⁵ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §125(1) ("A promise to transfer to any person any interest in land is within the Statute of Frauds.").

²⁶ Once again, in this example, the structure of the syllogism is more readily apparent if we reduce its components to symbols. If we assign the term "transfer of an interest in land" the letter "A" and assign "within the statute of frauds" the letter "B" the syllogism takes this form:

If A then B.

A.

Therefore B.

²⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 25, at §125(1).

²⁸ Here the fallacy takes the following form:

If A, then B.

B.

Therefore, A.

the form cannot be relied upon to ensure the truth of the conclusion.²⁹ Where a syllogism violates one of these rules of logical form, the syllogism is invalid, and the argument is fallacious.³⁰ For a litigator, this seemingly esoteric distinction has real, important, practical significance. If your opponent's argument fits into this fallacious pattern, it is illogical and inherently false. A litigator's ability to label their opponent's argument as necessarily illogical provides a powerful advocacy tool. The rules of the hypothetical syllogism are simple ones. However, their simplicity is, in part, what makes them so easy to violate without notice. Accordingly, understanding the fallacy begins with an understanding of the basic rules necessary for a well-formed hypothetical syllogism.

A hypothetical syllogism must contain a conditional premise, a categorical premise, and a conclusion.³¹ Additionally, the conditional premise and categorical premise must take one of two forms. The first form of a well-formed hypothetical syllogism requires that the categorical premise must affirm the truth of the antecedent of the conditional premise and the consequent of the conditional premise must be the conclusion. This means that we must consider the two terms of the categorical premise. If the categorical premise is "If A, then B," "A" is the antecedent and "B" is the consequent. The syllogism is well formed if the categorical premise affirms the truth of the antecedent term of the hypothetical ("A") and the conclusion affirms the truth of the consequent of the hypothetical ("B"). If the hypothetical syllogism takes this form, it is given the name *modus ponens*.³² Accordingly, the following would be an example of a well-formed hypothetical in the form of *modus ponens*:

1. If A is true, then B is true.

²⁹ See DOUGLAS WALTON, *INFORMAL LOGIC, A PRAGMATIC APPROACH* 138 (1989) ("[I]n a deductively valid argument, it is logically impossible for all the premises to be true and the conclusion false").

³⁰ See C. L. HAMBLIN, *supra* note 5, at 35-37. See also *supra* note 21 (discussing the distinction between pure and mixed hypothetical syllogisms).

³¹ COPI & COHEN, *supra*, note 3, at 301.

³² See C. L. HAMBLIN, *supra* note 5, at 35-37. See also DOUGLAS WALTON, *FUNDAMENTALS OF CRITICAL ARGUMENTATION* 62 (2006).

2. A is true.
3. Therefore, B is true.

There is an alternative form of the hypothetical that is also valid. If the categorical premise affirms the falsity of the consequent of the conditional premise, and the conclusion asserts the falsity of the antecedent of that conditional premise, then that syllogism too is well formed, and is given the name *modus tollens*.³³ Accordingly, the following would be an example of a well-formed hypothetical in the form of *modus ponens*:³⁴

1. If A is true, then B.
2. B is false.
3. Therefore, A is false.

The rule, applicable to hypothetical syllogisms has been summarized this way: "A valid hypothetical syllogism either denies the consequent . . . or affirms the antecedent . . . of the major premises; it doesn't deny the antecedent or affirm the consequent."³⁵

II. THE FALLACY OF DENYING THE ANTECEDENT IS A LOGICAL FALLACY THAT TRANSPIRES WHEN A PARTY FAILS TO FOLLOW RULES OF LOGIC

Understanding the rules and components of a well-formed hypothetical sheds some light on the nature of the Fallacy of Denying the Antecedent. The name of the fallacy is descriptive of what is wrong with the logical structure of the argument when it fails to follow the rules. Simply put, where the previously discussed rules of logic are observed, the argument takes one of two forms, either *modus tollens* or *modus ponens*. Where the argument observes these rules of logic and takes one of

³³ See WALTON, *supra* note 32, at 62.

³⁴ COPI & COHEN, *supra* note 3, at 301-02.

³⁵ NORMAN L. GEISLER & RONALD M. BROOKS, COME LET US REASON TOGETHER 65 (1990).

these two forms, it is logically well-formed, and its premises, if true, ensure the truth of the argument's conclusion.³⁶

Conversely, where the rules of logic are not observed, the argument takes the form of a fallacy. The Fallacy of Denying the Antecedent is one fallacy that results from failure to observe the logical rules. Where the argument denies the antecedent term of the hypothetical syllogism, it violates the rule that requires the antecedent term be affirmed. Accordingly, when the antecedent term is denied, the argument commits the Fallacy of Denying the Antecedent and is logically invalid. An example of the fallacy is:

1. If the subject of a contract is the sale of an interest in land, then the contract is within the Statute of Frauds.³⁷
2. The contract is not a contract to sell an interest in land.
3. Therefore, the contract is outside the Statute of Frauds.³⁸

In this example, the hypothetical premise's antecedent term is "the subject of a contract is a transfer of an interest in land." The argument's categorical premise denies that term by stating that "the contract is a contract to transfer an interest in land."

After considering this logically invalid form of argument, it is apparent why it is invalid. The fact that B can be inferred from A does not provide any basis to infer that anything can be

³⁶ See also DOUGLAS WALTON, *supra* note 32, at 62.

³⁷ See RESTATEMENT (SECOND) CONTRACTS §125 (1979). Contracts that are within one of the categories of the Statute of Frauds generally must be in writing in order to be enforced. A contract that fits within one of these categories is said to be "within" the Statute of Frauds. Those contracts that do not fall within one of the Statute of Frauds categories are said to be "without" or "outside" the Statute of Frauds.

³⁸ Once again, in this example, reducing the terms to symbols can reveal the structure of the syllogism. If we assign the term "transfer of an interest in land" the letter "A" and assign "within the Statute of Frauds" the letter "B" the syllogism takes this form:

If A then B.

Not A.

Therefore, not B.

inferred from the absence of A. The argument above illustrates this. We know that, as a matter of law, a contract for the sale of land is within the Statute of Frauds. The Statute of Frauds makes that very clear.³⁹ However, we also know that, if a contract does not involve a transfer of an interest in land, it does not necessarily require an inference that the contract is outside the Statute of Frauds. There are categories of contracts, other than contracts for the transfer of an interest in land, that are within the Statute of Frauds.⁴⁰

III. COURTS HAVE USED THE FALLACY OF DENYING THE ANTECEDENT TO EVALUATE LEGAL ARGUMENTS

The Fallacy of Denying the Antecedent is not exclusively a device of philosophy. It has application in legal reasoning and has been applied by judges evaluating litigants' arguments fre-

³⁹ RESTATEMENT (SECOND) CONTRACTS §125 (1979).

⁴⁰ For example, the Restatement (Second) Contracts describes several categories of contracts that are within the Statute of Frauds:

(1) The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception:

- (a) a contract of an executor or administrator to answer for a duty of his decedent (the executor-administrator provision);
- (b) a contract to answer for the duty of another (the suretyship provision);
- (c) a contract made upon consideration of marriage (the marriage provision);
- (d) a contract for the sale of an interest in land (the land contract provision);
- (e) a contract that is not to be performed within one year from the making thereof (the one-year provision).

(2) The following classes of contracts, which were traditionally subject to the Statute of Frauds, are now governed by Statute of Frauds provisions of the Uniform Commercial Code:

- (a) a contract for the sale of goods for the price of \$500 or more (Uniform Commercial Code § 2-201);
- (b) a contract for the sale of securities (Uniform Commercial Code § 8-319);
- (c) a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond \$5000 in amount or value of remedy (Uniform Commercial Code § 1-206).

RESTATEMENT (SECOND) CONTRACTS §110.

quently.⁴¹ Reviewing these cases and seeing examples of how judges use this logical fallacy to evaluate legal arguments helps us to identify the fallacy in legal argument. This is particularly helpful when the argument fits into a certain pattern, a pattern that will emerge from reviewing just a sample of the case that discuss the Fallacy of Denying the Antecedent. A sampling of those cases follows.

First, *Zinpro Corp. v. Ridenour* was a declaratory action for determination of the enforceability of an employer-employee confidentiality agreement.⁴² The court reversed the trial court's judgment declaring a confidentiality agreement between the parties unenforceable and decreeing that the employee Ridenour could compete against the employer Zinpro in the manufacture and sale of organic trace minerals.⁴³ Zinpro argued, *inter alia*, that any determination of the confidentiality agreement's validity was not a justiciable controversy.⁴⁴ Zinpro's argument was based on the court's prior holding that justiciability of a controversy can be shown by the imminence of litigation. Zinpro argued that because justiciability of a controversy could be shown by the imminence of litigation, and

⁴¹ *Carver v. Lehman*, 528 F.3d 659, 671 (9th Cir. 2008), *withdrawn*, 540 F.3d 1011 (9th Cir. 2008); *Agri Processor Co. v. NLRB*, 514 F.3d 1, 6 (D.C. Cir. 2008); *E. Armata, Inc. v. Korea Commer. Bank*, 367 F.3d 123, 131 n.10 (2d Cir. 2004); *TorPharm Inc. v. Ranbaxy Pharms., Inc.*, 336 F.3d 1322, 1329, 1329 n.7 (Fed. Cir. 2003); *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 703 (2d Cir. 1980); *Nw. Steel Erection Co. v. Zurich Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 4082, n.5 (D. Neb. Jan. 18, 2008); *Bell Atl. Corp. v. MFS Commc'ns Co.*, 901 F. Supp. 835, 849 (D. Del. 1995); *Villines v. Harris*, 11 S.W.3d 516, 520 n.2 (Ark. 2000); *Thomson v. Beuchel*, 2007 Cal. App. Unpub. LEXIS 6242, n.6 (Cal. App. 2d Dist. 2007); *Thompson v. Clarkson Power Flow, Inc.*, 149 Ga. App. 284, 285 n.1 (Ga. Ct. App. 1979); *French v. State*, 362 N.E.2d 834, 843 n.1 (Ind. 1977); *Mark v. Comm'r of Pub. Safety*, 2005 Minn. App. LEXIS 500 n.3 (Minn. Ct. App. May 10, 2005); *Health Pers. v. Peterson*, 629 N.W.2d 132, 135 n.3 (Minn. Ct. App. 2001); *State v. Clifford*, 121 P.3d 489, 501 (Mont. 2005); *State v. Wetzel*, 114 P.3d 269, 275-76 (Mont. 2005); *Dep't 56, Inc. v. Bloom*, 186 Misc. 2d 901, 904 (N.Y. Sup. Ct. 2001); *Iams v. DaimlerChrysler, Corp.*, 883 N.E.2d 466, 478-79 (Ohio Ct. App. 2007); *Edwards v. Riverdale Sch. Dist.*, 188 P.3d 317, 320-21 (Or. Ct. App. 2008); *Hale v. Water Res. Dep't*, 55 P.3d 497, 502 (Or. Ct. App. 2002); *In re Luna*, 175 S.W.3d 315, 320, 320 n.4 (Tex. App. 2004), *opinion withdrawn*, *In re Luna*, 275 S.W.3d 537 (Tex. App. 2008); *Thompson v. State*, 108 S.W.3d 269, 278 (Tex. Crim. App. 2003); *Zinpro Corp. v. Ridenour*, 1996 Tex. App. LEXIS 3380, at *2 n. 4 (Tex. App. Aug. 1, 1996).

⁴² 1996 Tex. App. LEXIS 3380, at *10 n.4 (Tex. App. Aug. 1, 1996).

⁴³ *Id.* at *34.

⁴⁴ *Id.* at *10.

Ridenour failed to establish that litigation was not imminent, the claim was not justiciable.⁴⁵

The court rejected Zinpro's argument based on the Fallacy of Denying the Antecedent, stating, "Although we have previously held that the justiciability of a controversy *can be* shown by the imminence of litigation, that holding does not compel the contrary conclusion that failure to show litigation is imminent establishes non-justiciability."⁴⁶ "If litigation is imminent, then the controversy is justiciable. A conclusion that when litigation is not imminent, a controversy is not justiciable, is described by logicians as denying the antecedent, an invalid form of reasoning."⁴⁷ While the court's description of the fallacy is limited, its application is accurate. Placing the argument in syllogistic form might look like this:

1. If litigation is imminent, then the controversy is justiciable.
2. Litigation is not imminent.
3. Therefore, the controversy is not justiciable.

As the court properly recognizes, the categorical premise of this argument ("litigation is not imminent") denies the antecedent term ("litigation is imminent") in an effort to justify concluding the truth of the consequent term ("the controversy is not justiciable"). While the structure of this argument fails, at first glance, there is something about the syllogism that sounds credible. Likely, it is because we are comfortable with a *modus ponens* argument, if not by its name, then by its structure. Because the invalid logical structure of the Fallacy of Denying the Antecedent is similar to the valid, familiar structure of *modus ponens*, the two forms are easily confused. It is the simple rule

⁴⁵ *Id.*

⁴⁶ *Id.* at *10 (citation omitted).

⁴⁷ *Id.* at *10 n.4 (citing W. EDGAR MOORE ET. AL., CREATIVE AND CRITICAL THINKING (1985)).

of a formally valid hypothetical syllogism that separates the two.⁴⁸

A similar result was reached in *Iams v. DaimlerChrysler*.⁴⁹ In *Iams*, the buyer of a new vehicle manufactured by defendant DaimlerChrysler brought claims under Ohio's Lemon Law and for breaches of DaimlerChrysler's express and implied warranties under the Magnuson-Moss Warranty Act.⁵⁰ The trial court granted summary judgment in favor of DaimlerChrysler on both the Lemon Law claim and the Magnuson-Moss Warranty Act claim.⁵¹

The court of appeals analyzed the trial court's logic. The trial court first addressed the plaintiff's Lemon Law claim and determined that it was invalid. The trial court applied the rule that if the Lemon Law claim was valid, the Magnuson-Moss Warranty Act claim must be valid. Next, the trial court concluded that since Lemon Law claim was *not* valid, the Magnuson-Moss Warranty Act claim was *not* valid.⁵² The court of appeals rejected the trial court's reasoning, based on the Fallacy of Denying the Antecedent.⁵³ The court of appeals explained: "The court's reasoning has the following syllogistic form: If A, then B. Not A, therefore not B. This syllogistic form is the logical fallacy known as denying the antecedent, and therefore, the trial court's reasoning is erroneous."⁵⁴

⁴⁸ Consider how similar the logical structure of this fallacious argument is to the valid form of the argument. Taking the valid form of *modus ponens*, the argument would be:

1. If litigation is imminent, then the controversy is justiciable.
2. Litigation is imminent.
3. Therefore, the controversy is justiciable.

Similarly, the fallacious form of the argument is also similar to the other form of valid hypothetical syllogism, *modus tollens*:

1. If litigation is imminent, then the controversy is justiciable.
2. The controversy is not justiciable.
3. Therefore, litigation is not imminent.

⁴⁹ 883 N.E.2d 466 (Ohio. App. 2007).

⁵⁰ *Id.* at 469.

⁵¹ *Id.*

⁵² *Id.* at 478-79.

⁵³ *Id.* at 479.

⁵⁴ *Id.*

Stripped to its syllogistic essentials, the trial court's argument can be written as follows:

1. If the Lemon Law claim is valid, then the Magnuson-Moss Warranty Act is valid.
2. The Lemon Law claim is invalid.
3. Therefore, the Magnuson-Moss Warranty Act is invalid.

The structure of the argument demonstrates the fallacy. The categorical premise, "[t]he Lemon Law claim is invalid," denies the antecedent term. Accordingly, the argument fails to follow the rules of the hypothetical syllogism, fails to take the form of *modus ponens*, and is not logically well-formed. As a result, the premises cannot guarantee the truth of the conclusion. The court was right to reject the argument as committing the Fallacy of Denying the Antecedent and therefore illogical.

The opinion in *Edwards v. Riverdale School District*⁵⁵ is another example of a court using the Fallacy of Denying the Antecedent to reject a party's legal argument. In this case, the Riverdale School District dismissed respondent Edwards from his position as athletic director.⁵⁶ Edwards appealed the decision to the Oregon Fair Dismissal Appeals Board, arguing that the Riverdale School District failed to follow procedures that apply to the dismissal of teachers.⁵⁷ The Riverdale School District responded to Edwards' claims, arguing that Edwards was not, in fact, a teacher but instead was an administrator who is not subject to the procedures that apply to the dismissal of teachers.⁵⁸ The applicable statute provided that "'administrator' includes a teacher the majority of whose work time is devoted to service as a 'supervisor, principal, vice principal or director of a department or the equivalent.'"⁵⁹ The dispute focused on the

⁵⁵ 188 P.3d 317 (Or. Ct. App. 2008).

⁵⁶ *Id.* at 318.

⁵⁷ *Id.*

⁵⁸ *Id.* at 317-19.

⁵⁹ *Id.* at 318 (citing OR. REV. STAT. § 342.815(1) (2009)).

language “director of a department” in this statutory definition.⁶⁰

Riverdale School District argued in favor of the *Webster’s Dictionary* definition of director: “one that directs . . . the head or chief of an organized occupational group (as a bureau, foundation, institute, school).”⁶¹ Riverdale School District further argued that “chief” refers to “the person holding the ‘highest’ office or ranking.”⁶² Therefore, Riverdale School District concluded that to qualify as an administrator, “[the] individual [must] possess[] the highest rank or degree of authority to make decisions about the department.”⁶³

The court rejected this reasoning: “[I]t seems clear that, while an individual who is a ‘head or chief’ of an occupational group may be a ‘director,’ merely because he or she is *not* such a head or chief does not mean that he or she is *not* a director.”⁶⁴ The court went on to explain the problem with this argument in terms of logical fallacy: “Among other things, such reasoning relies on the logical fallacy of denying the antecedent.”⁶⁵ The court explained that “[a] director, in ordinary usage, more generally refers to one who ‘regulate[s] the activities or course of,’ one who ‘administer[s],’ and one who ‘assist[s] by giving advice, instruction, and supervision.”⁶⁶

We see in *Edwards* the same syllogistic pattern of argument that we saw in *Zinpro* and *Iams*:

1. If Edwards is a “Head or Chief” he is a “Director.”
2. Edwards is not a “Head or Chief.”
3. Therefore, Edwards is not a “Director.”

Since the categorical premise (“Edwards is not a ‘Head or Chief’”) denies the antecedent term (“Head or Chief”), the argument commits the fallacy of Denying the Antecedent.

⁶⁰ *Id.*

⁶¹ *Id.* at 320.

⁶² *Id.*

⁶³ *Id.* at 321.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

Crouse-Hinds Co. v. InterNorth, Inc., involved a tender offer's compliance with securities laws.⁶⁷ The trial court concluded that the plaintiff, InterNorth, carried its burden of demonstrating self-interest or bad faith on the part of the Crouse-Hinds.⁶⁸ The United States Second Circuit Court of Appeals reversed this finding, recognizing that the district court had based its decision on the fallacy of denying the antecedent.⁶⁹ The Court observed:

As his starting point, the district judge gave extended consideration to the decision in *Treadway*, in which we found that because the *Treadway* directors, other than the chairman, were not to remain in office after the merger, perpetuation of their control could hardly have been their motivation for actions in furtherance of the merger Unfortunately, the district judge inferred from this that a quite different proposition must also be true—i.e., that if the directors *are* to remain on the board after the merger, perpetuation of their control *must be presumed* to be their motivation. This inference has no basis in either law or logic.⁷⁰

Considered in the form of the syllogism, the argument considered was:

1. If a corporate director is not to remain in office after a merger, perpetuation of director control cannot be the motivation for their actions in furtherance of the merger.
2. The corporate directors were to remain in office after the merger.
3. Therefore, perpetuation of control must have been the motivation for their actions in furtherance of the merger.

The absence of "basis in either law or logic" referred to by the court is the result of a logically fallacious argument structure.⁷¹ The court summarized the essence of the Fallacy of De-

⁶⁷ 634 F.2d 690, 703 (2d Cir. 1980).

⁶⁸ *Id.* at 698-99.

⁶⁹ *Id.* at 702.

⁷⁰ *Id.*

⁷¹ *Id.*

nying the Antecedent this way: "The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. The process of inferring one from the other is known as 'the fallacy of denying the antecedent.'" ⁷²

The argument in *Crouse-Hinds* aptly demonstrates how, in entirely practical factual circumstances, this fallacious pattern of argument can be made and easily avoid discovery. Here, after a careless reading of the argument, one might think the argument a sound one. The fallacious nature of the argument is further camouflaged in the syntax of the premises. The hypothetical premise is stated in the negative: "because the . . . directors . . . were not to remain in office after the merger, perpetuation of their control could hardly have been their motivation for actions in furtherance of the merger." ⁷³ While we can simplify this premise to state "if a corporate director is not to remain in office after a merger, perpetuation of director control cannot be the motivation for their actions in furtherance of the merger" we need to include the negative terms to accurately represent the original argument. Accordingly, denying the antecedent term means denying a negative. The antecedent term "if a corporate director is not to remain in office after a merger" once denied is "a corporate director is to remain in office." Since there are no words normally associated with negation, e.g., "no," "none," "not," within the sentence it might not readily appear as a denial of the antecedent term.

Second, the structural similarity between the valid form of a hypothetical syllogism and the invalid form that commits the Fallacy of Denying the Antecedent is what makes the fallacy so problematic. It is rarely obvious to a casual observer. It "looks" correct unless scrutinized at a formal level. In fact, something about the structure of the argument suggests that it is credible, since it is typically only a word or two away from taking the form of *modus ponens*, a time-tested, oft employed, comfortable argumentative structure.

⁷² *Id.* at 703 n.20 (citing J. COOLEY, A PRIMER OF FORMAL LOGIC 7 (1942)).

⁷³ *Id.* at 702.

IV. USING THE FALLACY OF DENYING THE ANTECEDENT TO IDENTIFY AND EXPLAIN FAULTY REASONING

The process of identifying and explaining the Fallacy of Denying the Antecedent, begins and ends with a simple rule of logic. Once one has some understanding of the rules of the hypothetical syllogism, the real utility of using logical fallacies to evaluate legal arguments is that it provides a pattern of faulty reasoning that any lawyer can use to identify and explain what is wrong with a fallacious argument. More importantly, this pattern can be recognized without spending substantial amounts of time deconstructing the form of an argument or learning the philosophical bases of logic or even understanding all of the rules of well formed logical argument.

Instead, understanding one simple logical fallacy provides lawyers with a simple, identifiable pattern of reasoning that is necessarily invalid. All the lawyer needs to do is know the pattern, give the pattern a name, and explain that the pattern violates a rule of logic. With that, the lawyer has been empowered with the ability to conclusively negate the argument and label it as "illogical." Few judges will be comfortable accepting an "illogical" argument.

This fallacious pattern is more obvious upon comparing the arguments made in the four cases discussed above. Compare the arguments made in *Zinpro*, *Iams*, *Edwards*, and *Crouse-Hinds* respectively:

1. If litigation is imminent, then the controversy is justiciable.
2. Litigation is not imminent.
3. Therefore, the controversy is not justiciable.⁷⁴
1. If the Lemon Law claim is valid, then the Magnuson-Moss Warranty Act is valid.
2. The Lemon Law claim is invalid.

⁷⁴ *Zinpro Corp. v. Ridenour*, 1996 Tex. App. LEXIS 3380, at *10 n.4 (Tex. App. Aug. 1, 1996).

3. Therefore, the Magnuson-Moss Warranty Act is invalid.⁷⁵

1. If Edwards is a "Head or Chief," then he is a "Director."

2. Edwards is not a "Head or Chief."

3. Therefore, Edwards is not a "Director."⁷⁶

1. If a corporate director is not to remain in office after a merger, perpetuation of director control cannot be the motivation for their actions in furtherance of the merger.

2. The corporate directors were to remain in office after the merger.

3. Therefore, perpetuation of control must have been the motivation for their actions in furtherance of the merger.⁷⁷

Each of the arguments takes the same syllogistic form, illustrated symbolically as:

1. If A, then B.

2. Not A.

3. Therefore, not B.

Once the pattern in legal argument is identified, the explanation for why it is logically fallacious is simple. The pattern is incontrovertible proof that the argument violates the first rule of the hypothetical syllogism. The rule provides that, the syllogism is well formed if the categorical premise affirms the truth of the antecedent term of the hypothetical and the conclusion affirms the truth of the consequent of the hypothetical. Where the argument violates this rule by denying, instead of affirming,

⁷⁵ *Iams v DaimlerChrysler*, 883 N.E.2d 466, 497(Ohio. Ct. App. 2008).

⁷⁶ *Edwards v Riverdale Sch. Dist.*, 188 P.3d 317 (Or. Ct. App. 2008).

⁷⁷ *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 703 (2d Cir. 1980).

the antecedent term of the hypothetical premise, it commits the Fallacy of Denying the Antecedent.

While some judges might be unfamiliar with rules of philosophical logic or their precedential value, citation to the cases above will provide legal authority for the use of these philosophical rules in law. There are scores of cases that have used the rules of philosophical logic and specific fallacies as the basis for evaluating legal arguments. For example, cases have employed the Fallacies of the Undistributed Middle Term,⁷⁸ Affirming the Consequent,⁷⁹ and the Illicit Process of the Major or Minor Term.⁸⁰ Many of those cases specifically address the Fallacy of

⁷⁸ See, e.g., *Spencer v. Texas*, 385 U.S. 554, 578 (1967); *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 134 (1948); *Allied Erecting & Dismantling Co. v. USX Corp.*, 249 F.3d 191, 202 (3d Cir. 2001); *Aylett v. Sec'y of Hous. & Urban Dev. ex rel. Burris*, 54 F.3d 1560, 1569 (10th Cir. 1995); *Hernandez v. Denton*, 861 F.2d 1421, 1439 (9th Cir. 1988) (*vacated and remanded on other grounds by Denton v. Hernandez*, 493 U.S. 801 (1989)); *Regalado v. City of Chicago*, 1999 U.S. Dist. LEXIS 14902, at *4 (N.D. Ill. Aug. 31, 1999); *British Steel PLC v. United States*, 929 F. Supp. 426, 436 (Ct. Int'l Trade 1996); *Lucas Aerospace v. Unison Indus., L.P.*, 899 F. Supp. 1268, 1287 (D. Del. 1995); *Foster v. McGrail*, 844 F. Supp. 16, 20 (D. Mass. 1994); *Pearson v. Bowen*, 648 F. Supp. 782, 792 (N.D. Ill. 1986); *United States v. Gambale*, 610 F. Supp. 1515, 1525 (D. Mass. 1985); *Amusement Equip., Inc. v. Mordelt*, 595 F. Supp. 125, 130 (E.D. La. 1984) (*aff'd in part and rev'd in part*, *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 268 (5th Cir. 1985)); *Menora v. Ill. High Sch. Ass'n*, 527 F. Supp. 632, 636 (N.D. Ill. 1981); *Lakeland Constr. Co. v. Operative Plasterers Local No. 362*, 1981 U.S. Dist. LEXIS 11584, at *4 (N.D. Ill. Mar. 24, 1981); *Glenn v. Mason*, 1980 U.S. Dist. LEXIS 13233, at *7 (S.D.N.Y. Aug. 18, 1980); *Desilu Prod., Inc. v. Comm'r*, 24 T.C.M. (CCH) 1965 (1965); *Batty v. Ariz. State Dental Bd.*, 112 P.2d 870, 873 (Ariz. 1941); *Nickolas F. v. Superior Court*, 50 Cal. Rptr. 3d 208, 222 (Cal. Ct. App. 2006); *People v. Martinez*, 74 P.3d 316, 321 (Colo. 2003); *Royer v. State*, 389 So. 2d 1007, 1016 (Fla. Dist. Ct. App. 1980); *Barham v. Richard*, 692 So. 2d 1357, 1359 (La. Ct. App. 1997); *State v. Star Entm't*, 691 So. 2d 1221, 1230 (La. Ct. App. 1996); *Wein v. Carey*, 41 N.Y.2d 498, 503 (N.Y. 1977); *Hicks v. State*, 241 S.W.3d 543, 546 (Tex. Crim. App. 2007); *State v. Zespy*, 723 P.2d 564, 570 (Wyo. 1986).

⁷⁹ See, e.g., *Gilliam v. Nev. Power Co.*, 488 F.3d 1189, 1196 n.7 (9th Cir. Nev. 2007); *Stewart Foods v. Broecker*, 64 F.3d 141, 145 n.3 (4th Cir. Va. 1995); *United Tel. Co. v. F.C.C.*, 559 F.2d 720, 726 (D.C. Cir. 1977); *Topliff v. Wal-Mart Stores E. LP*, 2007 U.S. Dist. LEXIS 20533, at *183 (N.D.N.Y. Mar. 22, 2007); *Adams v. Louisiana-Pacific Corp.*, 284 F. Supp. 2d 331, 338 n.7 (W.D.N.C. 2003), *rev'd in part*, 177 Fed. Appx. 335, 337 (4th Cir. N.C. 2006); *United States v. Balcarczyk*, 52 M.J. 809, 812 (N.M. Ct. Crim. App. 2000); *In re Jeffery*, 2008 Cal. App. Unpub. LEXIS 7976, n.8 (Cal. App. 6th Dist. 2008); *Pirtle v. Cook*, 956 S.W.2d 235, 248 (Mo. 1997); *City of Green Ridge v. Kreisel*, 25 S.W.3d 559, 563 and n.2 (Mo. Ct. App. 2000); *Paulson v. State*, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000); *Culton v. State*, 95 S.W.3d 401, 405 (Tex. App. 2002).

⁸⁰ See, e.g., *Baker v. Amoco Oil Co.*, 761 F. Supp. 1386, 1392 (E.D. Wis. 1991); *State v. Zespy*, 723 P.2d 564, 570 n.1 (Wyo. 1986); *Hernandez v. Denton*, 861 F.2d 1421, 1439 (9th Cir. 1988); *Caterpillar Inc. v. United States*, 941 F. Supp. 1241, 1245 (Ct. Int'l

Denying the Antecedent.⁸¹ Accordingly, the legal authority for using the convention of logical fallacy to evaluate a legal argument is substantial.

However, the impact of the logical fallacy has its limits. While the fallacy is a powerful tool for exposing and diffusing the influence of an illogical argument, it does not necessarily invalidate the conclusion. Instead, it only invalidates the form of the argument purporting to support the conclusion. If an argument's structure is logically invalid, the result is that the argument cannot be used to support the truth of the conclusion. Another logically sound argument might still be crafted to support the conclusion. However, identifying and explaining the illogical nature of the argument will take the opponent to task, requiring that they either devise a logically valid argument to support their conclusion or concede defeat.

V. AN APPEAL TO LOGIC

The rules of logic make the logical fallacy such a powerful weapon for a litigator. By mastering logical fallacies, a litigator gains a decided advantage in his or her ability to evaluate and make logical arguments. Additionally, logic distinguishes the discipline of legal reasoning from other forms of argument, which might be more interested in making *a* point, than making the *correct* point. Those who make arguments based on fallacy instead of logic are those who, "like blunt weapons, tear and hack instead of cutting clean, who mistake the point in argument, waste their strength on trifles, misconceive their adversary, and leave the question more involved than they find it."⁸² These types of arguments are typified by logical fallacy. Lawyers frequently describe them as "overbroad," "off point," or simply "wrong," but such arguments should be more precisely and more persuasively described as logically fallacious.

Trade 1996); *Idaho Press Club, Inc. v. State Legislature*, 123 P.3d 397, 407 (Idaho 2006); *Cent. Dauphin Sch. Dist. v. Pa. Mfrs. Ass'n Ins. Co.*, 1992 Pa. D. & C.4th 289, 296 (1992); *State v. Euman*, 558 S.E.2d 319, 324 (W. Va. 2001).

⁸¹ See cases cited *supra* note 41.

⁸² JOHN HENRY NEWMAN, *THE SCOPE AND NATURE OF UNIVERSITY EDUCATION* 307 (2d ed. 1859).

While a busy litigator rarely has time to study formal logic, the logical fallacy provides a reliable and efficient method for identifying arguments comprised of invalid logical form. The ability to spot a defective logical skeleton allows a lawyer to identify the fault of an opponent's argument, explain that it is wrong, and most importantly, describe why it is wrong. Similarly, it allows lawyers to evaluate the logical integrity of their own reasoning, and ensure that their arguments are well formed, and not subject to logical attack. Importantly, the fallacy is a sort of shortcut to formal logical analysis. Seeing the pattern of logical fallacy through a few examples will allow a lawyer to spot the example in a trial court opinion, opposing counsel's motion, or an associate's draft brief in support of a dispositive motion.

The Fallacy of Denying the Antecedent is particularly easy to overlook. As much as any formal logical fallacy, its structure is apparently similar to, but substantively different from, argumentative structures that are both familiar to us and necessarily valid. Accordingly, the Fallacy of Denying the Antecedent is at once easy to overlook but essential to identify. However, once the pattern of reasoning described above is identified, the argument can be said to necessarily violate a fundamental rule of logic. Litigators, who hold themselves to the standard of "disciplined intellect," and who are mindful of the logical integrity of their arguments, will find that their discipline distinguishes their legal reasoning and makes for the most powerful sort of advocacy.

IT'S NOT A SMALL WORLD AFTER ALL: REGULATING OBESITY GLOBALLY

*Eloisa C. Rodriguez-Dod**

INTRODUCTION

Deemed the “greatest threat to public health today,”¹ obesity is defined as an abnormal accumulation of fat in the body.² Overweight means that one’s weight is greater than generally considered healthy for the body; this weight may be caused by bone or muscle density, water, or excessive fat.³ Having abnormal or excessive fat can lead to various health problems, including cardiovascular disease, diabetes, certain cancers, hypertension, high levels of cholesterol, and risk of stroke.⁴ “Overweight and obesity are major causes of morbidity and mortality in the United States and most industrialized countries of the world.”⁵

The rate of obesity and overweight among the world population has increased dramatically over the past several years in both adults and children.⁶ The most recent statistics compiled

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¹ Am. Med. Ass’n, Obesity, <http://www.ama-assn.org/ama/pub/physician-resources/public-health/promoting-healthy-lifestyles/obesity.shtml> (last visited Feb. 16, 2010). According to a study published in 2009, “[o]besity is growing faster than any previous public health issue [the United States] has faced.” UNITED HEALTH FOUND., AM. PUB. HEALTH ASS’N, & P’SHIP FOR PREVENTION, THE FUTURE COSTS OF OBESITY: NATIONAL AND STATE ESTIMATES OF THE IMPACT OF OBESITY ON DIRECT HEALTH CARE EXPENSES 2 (2009), available at <http://www.americahealthrankings.org/2009/report/Cost%20Obesity%20Report-final.pdf> [hereinafter FUTURE COSTS OF OBESITY].

² World Health Org., Obesity and Overweight (2006), <http://www.who.int/mediacentre/factsheets/fs311/en/index.html> [hereinafter WHO Obesity].

³ MedlinePlus, Obesity, <http://www.nlm.nih.gov/medlineplus/obesity.html> (last visited Feb. 16, 2010).

⁴ See Ctrs. for Disease Control & Prevention, Overweight and Obesity, <http://www.cdc.gov/nccdphp/dnpa/obesity/index.htm> (last visited Feb. 16, 2010).

⁵ M. Sharma, *Behavioural Interventions for Preventing and Treating Obesity in Adults*, 8 OBESITY REVS. 441, 441 (2007).

⁶ For a discussion of the global trend toward obesity and overweight, see generally WORLD HEALTH ORG., OBESITY: PREVENTING AND MANAGING THE GLOBAL EPIDEMIC 16-

by the World Health Organization show that the United States is one of the top fifteen reporting nations with a high percentage of both obese and overweight adults; other countries with high percentages of both include Bahrain, French Polynesia, Israel, Kuwait, Malta, Saudi Arabia, Seychelles, and the United Kingdom.⁷ Cuba, a country oft-equated with food shortages, recently reported that approximately thirty percent of its adult population is obese and over one-quarter of the island's residents tend toward obesity.⁸

Governments are recognizing the need to take action in trying to control this epidemic. For example, the City of Jerusalem placed solar-powered scales outside shopping centers and fast food outlets and will be creating walking paths with exercise machines in response to an Israeli government report chiding authorities for their lax efforts in controlling obesity.⁹

37 (2000), available at http://whqlibdoc.who.int/trs/WHO_TRS_894.pdf and Int'l Union of Nutritional Sci., The Global Challenge of Obesity and the International Obesity Task Force, <http://www.iuns.org/features/obesity/obesity.htm> [hereinafter IUNS] (last visited Feb. 16, 2010).

⁷ World Health Org., Global Database on Body Mass Index, <http://www.who.int/bmi/index.jsp> [hereinafter Global Database] (last visited Feb. 16, 2010). It is estimated that "[i]f current trends continue [in the United States], 103 million American adults will be considered obese by 2018." FUTURE COSTS OF OBESITY, *supra* note 1, at 2.

The World Health Organization calculates that globally in 2005 at least 20 million children under the age of five were overweight. WHO Obesity, *supra* note 2. It is also estimated that at least 155 million children between the ages of five and seventeen are either obese or overweight; of that number, approximately nineteen to twenty-nine percent are deemed to be obese. Int'l Ass'n for the Study of Obesity, Childhood Obesity, <http://www.iotf.org/childhoodobesity.asp> (last visited Feb. 16, 2010) (citing IASO International Obesity TaskForce, *Obesity in Children and Young People: A Crisis in Public Health*, 5 OBESITY REVS. 4 (2004)). However, estimates of childhood obesity are difficult to derive due to inconsistent measurement standards worldwide. WHO Obesity, *supra* note 3.

⁸ Anita Snow, *Cubans Wage Weight Fight*, MIAMI HERALD, June 16, 2007, at 11A.

⁹ Jewish Fed'n of Pinellas and Pasco Counties, FL, Jerusalem Municipality Lends Its Weight to Fight Against Obesity, <http://pinellas.ujcfedweb.org/page.aspx?id=176868> (last visited Mar. 1, 2010). The City of Jerusalem is not the first nor only municipality to create exercise parks. For example, Chicago, Illinois and Miami, Florida developed outdoor gyms, each after being cited as the "fattest city in America." Tania Veldemoro, *Fitness for Free at Coconut Grove Park*, MIAMI HERALD, Jan. 14, 2010, available at <http://www.miamiherald.com/1374/story/1423977.html> (last visited Mar. 1, 2010). "[Chicago] made a difference by supporting public access to fitness." *Id.* (quoting Aida Johnson, former member Chicago Mayor's Fitness Council).

Childhood obesity is a critical health care concern.¹⁰ There have been well-publicized efforts to regulate children's obesity both in the U.S. and abroad through such measures as mandated nutritional school lunch programs.¹¹ Those efforts are ongoing, and examination of those regulations will undoubtedly continue. This article focuses, however, on a less examined area of regulation—the recent worldwide efforts to curb obesity among adults. The regulations discussed in this article include measures proposed or adopted by either administrative agencies or legislative bodies, whether on a local or national level.

I. THE REGULATIONS

A. *I Can't Believe It's Not Butter*

Until recently, the average person was not particularly aware of trans fat nor its presence in prepared foods.¹² However, as of January 1, 2006, federal regulation required inclusion of trans fat content in the nutrition facts labels of packaged foods.¹³ Trans fat, also referred to as trans fatty acid or partially hydrogenated oil, is created by adding hydrogen to vegetable oils, turning them into solid fats; trans fat is used commercially primarily to extend shelf life and add taste to cooked foods.¹⁴

¹⁰ Ronni Litz Julien, *Healthful Kids*, <http://www.healthfulkids.com>; J. Madeleine Nash, *Obesity Goes Global*, *TIME*, Aug. 18, 2003, available at <http://www.time.com/time/magazine/article/0,9171,476417,00.html> (last visited Mar. 1, 2010).

¹¹ See, e.g., Jodi Kantor, *As Obesity Fight Hits Cafeteria, Many Fear a Note from School*, *N.Y. TIMES*, Jan. 8, 2007, at A14, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9801E4DA1530F93BA35752C0A9619C8B63> (last visited Mar. 2, 2010); Martha Mendoza, *Feds Fruitless in Getting Kids Off Junk Foods*, *MIAMI HERALD*, July 5, 2007, at 1; Janet Frankston Lorin, *Students Cleaning Healthy Plates*, *MIAMI HERALD*, Jan. 22, 2007, at 10A; Jonathan Watts, *China Targets Childhood Obesity with Compulsory Dancing*, *GUARDIAN*, June 5, 2007, available at <http://www.guardian.co.uk/world/2007/jun/05/china.schoolsworldwide>; *Burger King to End TV Child Ads*, *BBC NEWS*, Nov. 14, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/6147326.stm (last visited Mar. 3, 2010).

¹² See, e.g., Fed. Trade Comm'n, *In the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims and Health Claims; Proposed Rule*, Apr. 17, 2000, <http://www.ftc.gov/be/v000003.shtm> (last visited Mar. 1, 2010) (“[C]onsumer knowledge about trans fats is low”).

¹³ 21 C.F.R. § 101.9 (2009).

¹⁴ Am. Heart Ass'n, *Trans Fat*, <http://www.americanheart.org/presenter.jhtml?identifier=3045792> [hereinafter AHA] (last visited Feb. 16, 2010); U.S.

This “bad” fat contributes to heart disease and obesity.¹⁵ In a study of monkeys that were fed the same amount of calories, those that ate a diet rich in trans fat foods gained more weight and abdominal fat than those that consumed a diet rich in unsaturated fats.¹⁶

The same year that the federal regulation took effect, the New York City Health Department proposed an innovative means to try to lessen the threat of trans fat-related health problems among its constituents, mandating that artificial trans fats be practically removed from foods served by restaurants in the City.¹⁷ The proposed amendment to the City’s Health Code was approved in December 2006.¹⁸ The Health Department specifically noted that it adopted the resolution “in an effort to decrease the well-documented risk of ischemic heart and other disease conditions associated with consumption of such products.”¹⁹

Section 81.08 bans the use of artificial trans fats in restaurant food, “except food . . . served directly to patrons in a manufacturer’s original sealed package.”²⁰ The Health Department followed the U.S. Food and Drug Administration labeling regulations in permitting, however, service of foods that contain less than 0.5 grams of trans fat per serving.²¹

Food & Drug Admin., Revealing Trans Fats, http://www.pueblo.gsa.gov/cic_text/food/reveal-fats/reveal-fats.htm (last visited Feb. 16, 2010). Small amounts of trans fats also may be found naturally in some meats and dairy products. AHA, *supra* note 14.

¹⁵ Tommy G. Thompson, Sec’y of Health & Human Servs., Remarks at Trans Fat Press Conference at U.S. Dep’t of Health & Human Res. (July 9, 2003) *available at* <http://www.hhs.gov/news/speech/2003/030709.html> (last visited Mar. 1, 2010).

¹⁶ Anna Gosline, *Why Fast Foods Are Bad, Even in Moderation*, NEW SCIENTIST, June 12, 2006, *available at* <http://www.newscientist.com/article/dn9318> (last visited Mar. 1, 2010).

¹⁷ N.Y. CITY DEPT OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.08) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (Dec. 5, 2006), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf> [hereinafter NOTICE OF AMENDMENT (§ 81.08)] (last visited Mar. 1, 2010).

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 6.

²⁰ N.Y. CITY, N.Y., HEALTH CODE REGULATION § 81.08(a) (2008).

²¹ *Id.* § 81.08(b); *see also* NOTICE OF AMENDMENT (§ 81.08), *supra* note 18.

New York City implemented its trans fat code in two phases.²² Restaurants were required to ensure that by July 1, 2007, oils, shortening, and margarines used for spreads and deep frying contain less than 0.5 grams of artificial trans fat per serving.²³ The second phase, effective July 1, 2008, extended the ban to all foods containing artificial trans fat.²⁴

Other U.S. jurisdictions, whether on a state, county, or municipal level, quickly followed suit.²⁵ As of October 2008, at least twenty-seven states had either proposed or enacted laws limiting trans fats.²⁶ Cities, such as Baltimore, Boston, Chicago, Philadelphia, San Francisco, and Tiburon, California, have also adopted similar ordinances.²⁷ Some of these state and local regulations, however, would encourage only voluntary compliance,²⁸ while others would apply only to schools.²⁹

B. The 1 2 3's of Calorie Counting

Again in the forefront of the battle against obesity, in 2006 New York City also adopted a regulation that would have required restaurants who were already voluntarily disclosing calorie counts of their foods to include such information on their menus and menu boards.³⁰ The New York City Board of Health

²² See § 81.08(d).

²³ *Id.*

²⁴ *Id.*

²⁵ For a comprehensive list of proposed and enacted state legislation, see Nat'l Conference of State Legs., Trans Fat and Menu Labeling Legislation, <http://www.ncsl.org/programs/health/transfatmenulabelingbills.htm> [hereinafter NCSL] (last visited Feb. 16, 2010).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., S.F., CAL., HEALTH CODE art. 37, §§ 3701-11 (2008), available at <http://www.municode.com/content/4201/14136/HTML/ch037.html> (last visited Mar. 10, 2010).

²⁹ See, e.g., CAL. EDUC. CODE § 49431.7 (West 2007).

³⁰ See N.Y. CITY DEPT OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.50) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (Dec. 5, 2006), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf> (last visited Mar. 10, 2010); see also David B. Caruso, *New Menus Show the Real Costs of Fast Food*, MIAMI HERALD, July 19, 2008, at 10A (calorie count regulation is "first of its kind in any U.S. city"); Paul Frumkin, *Appeal Considered as Court Upholds NYC Labeling Law*, NATION'S REST. NEWS, Feb. 17, 2009,

had enacted the regulation over concerns of an “obesity epidemic.”³¹ Over fifty percent of the population of New York City was found to be overweight or obese.³² Given that “Americans receive an estimated one-third of their caloric intake away from home,”³³ the City presumed that consumers would likely reduce their intake of calories if they knew how much they were eating.³⁴ Although originally thought by some to be less controversial than the elimination of trans fat from restaurant foods,³⁵ this and other similar measures spawned several lawsuits.

As originally enacted, New York City Health Code section 81.50 was struck down in federal court following a complaint filed by the New York State Restaurant Association (“NYSRA”).³⁶ The NYSRA alleged that the regulations violated the federal Nutrition Labeling and Education Act of 1990 (“NLEA”) and the First Amendment.³⁷ Although it lauded the New York City Health Board for its desire to control obesity,³⁸ the U.S. District Court for the Southern District of New York agreed with the NYSRA and held that section 81.50 was preempted by the NLEA, but did not rule on the First Amendment claim.³⁹

21 U.S.C. § 343(r) of the NLEA provides that food is deemed misbranded whenever “a claim is made in the . . . labeling of the food” characterizing the level of nutrient required to be disclosed under § 343(q) of the statute.⁴⁰ The latter subsection

<http://www.nrn.com/breakingNews.aspx?id=363256#> (last visited Mar. 10, 2010) (“New York is the first U.S. jurisdiction to enact such a regulation.”)

³¹ N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) (citing Decl. of Thomas R. Frieden, Comm’r of N. Y. City Dep’t of Health & Mental Hygiene, ¶ 3).

³² *Id.* Specifically, 34.4% were found to be overweight and 21.7% obese. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See Gregory M. Lamb, *Lead Paint, Cigarettes: Are Trans Fats Next?*, THE CHRISTIAN SCI. MONITOR, Oct. 12, 2006, available at <http://www.csmonitor.com/2006/1012/p13s01-lifo.html> (last visited Mar. 1, 2010) (“A second proposal issued at the same time by the New York City Health Department has garnered less discussion [than the trans fat issue] but is at least as important.”).

³⁶ N.Y. State Rest. Ass’n, 509 F. Supp. 2d at 353.

³⁷ *Id.* at 352.

³⁸ *Id.* at 363 n.18.

³⁹ *Id.* at 352-53, 363.

⁴⁰ 21 U.S.C. § 343(r) (2006). The statute exempts claims that use certain terms permitted by regulations. *Id.*

mandates that “food intended for human consumption and . . . offered for sale” be labeled with certain nutritional information; restaurants are exempted from this requirement.⁴¹ Nevertheless, § 343(r) applies to all food sellers, but only when they voluntarily make claims in food labeling covered by the statute.⁴² However, § 343(r) exempts from its coverage statements made pursuant to § 343(q).⁴³ However, because the § 343(q) mandate does not apply to restaurants, voluntary disclosure by restaurants of calorie counts—a claim characterizing the level of nutrient in a food⁴⁴—implicates § 343(r).⁴⁵

The Court noted that the NLEA contained a provision that expressly preempts state and local regulations regarding nutrient claims that are “not identical to the requirement of section 343(r).”⁴⁶ The Court found that the requirements of section 81.50 were not identical to those found in § 343(r) and its implementing regulations.⁴⁷ First, section 81.50 mandated disclosure of calorie counts on menus and menu boards, whereas regulations enacted pursuant to § 343(r) do not so restrict the form for providing information on claims made by food purveyors, but rather permit various means to do so.⁴⁸ Second, section 81.50 requires that calorie counts be calculated pursuant to 21 C.F.R. § 101.9(c)(1)(i), whereas the federal regulations permit calculation of nutrient amounts in claims covered by § 343(r) “by any reasonable bases.”⁴⁹ Thus, in imposing additional disclosure requirements on restaurants who already voluntarily publicized calorie information, the New York City ordinance implicated § 343(r) and its corresponding preemption provision.⁵⁰ The Court

⁴¹ *Id.* § 343(q).

⁴² *See N.Y. State Rest. Ass’n*, 509 F. Supp. 2d at 357.

⁴³ 21 U.S.C. § 343(r) (2006).

⁴⁴ *See N.Y. State Rest. Ass’n*, 509 F. Supp. 2d at 361.

⁴⁵ *Id.* at 363.

⁴⁶ *Id.* at 358, 362 (citing 21 U.S.C. § 343-1(a)(5) (2006)). Although the Court cites to § 343-1(a)(5), which specifically refers to preemption of claims under § 343(r), the wording of the opinion refers to the latter as § 403(r), which is the subsection number of that statute in the Federal Food, Drug, and Cosmetic Act, under which the NLEA was enacted. *See id.*; Fed. Food, Drug, and Cosmetic Act, ch. 675, § 403, 52 Stat. 1047 (1938).

⁴⁷ *N.Y. State Rest. Ass’n*, 509 F. Supp. 2d at 362.

⁴⁸ *Id.* at 362 (citing 21 C.F.R. § 101.10).

⁴⁹ *Id.*

⁵⁰ *Id.*

suggested, in dicta, that the City could otherwise have enacted a posting requirement on all restaurants, as such a mandate would not be preempted by either § 343(q) or §343(r)⁵¹; the City, however, had failed to do so.⁵²

Barely one month after losing the federal court challenge to its legislation, the City introduced another version of section 81.50.⁵³ The City paid heed to the Court's "suggestion"⁵⁴ and put forth a similar regulation that now applied to any New York City restaurant that operated as at least one of a group of fifteen or more establishments doing business nationally.⁵⁵ This new regulation continued the mandate that the affected restaurants post calorie counts on their menus and menu boards.⁵⁶ The City was intent in pursuing its goal of a healthier constituency. Noting that consumers generally do not fully comprehend the calorie content of foods⁵⁷ and that those eating fast food generally consume more calories,⁵⁸ the City proclaimed that the calorie count information "would enable New Yorkers to make more informed, healthier choices and can reasonably be expected to reduce obesity and the many related health problems which obesity causes."⁵⁹ However, Dr. Thomas R. Frieden, Commissioner of the City's Department of Health and Mental Hygiene, acknowledged that the City did not have "100 percent proof that it's going to work, but [has] a reasonable expectation it will be successful."⁶⁰ Nonetheless, the City adopted the re-

⁵¹ *Id.* at 363. The court noted that "states are not precluded . . . from establishing requirements for the mandatory nutrition labeling of restaurant food." *Id.* at 357.

⁵² See *id.* at 363; Alan Feuer, *Judge Throws Out New York Rule Requiring Restaurants to Post Calories*, N.Y. TIMES, Sept. 12, 2007, available at http://www.nytimes.com/2007/09/12/nyregion/12calories.html?_r=1.

⁵³ See N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF A RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE (Jan. 22, 2008), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf> [hereinafter NOTICE TO REENACT § 81.50] (last visited Mar. 1, 2010).

⁵⁴ See *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 363; see *supra* note 52 and accompanying text.

⁵⁵ N.Y. CITY, N.Y., RULES art. 24 § 81.50(a)(1) (2008).

⁵⁶ *Id.* § 81.50(c).

⁵⁷ NOTICE TO REENACT § 81.50, *supra* note 53, at 5.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 2.

⁶⁰ Stephanie Saul, *Conflict on the Menu*, N.Y. TIMES, Feb. 16, 2008, at B1, available at <http://www.nytimes.com/2008/02/16/business/16obese.html>.

vised measure on January 22, 2008, to become effective March 31, 2008.⁶¹

Shortly thereafter, the NYSRA once again sued the City, alleging the same grounds as in the first lawsuit.⁶² On April 16, 2008, the Court issued its opinion, in which it denied the NYSRA's claims for injunctive relief and summary judgment, and this time sided with the City in holding that section 81.50, as revised, was not preempted by federal law.⁶³

The Court also addressed the NYSRA's First Amendment claim. It found that, although section 81.50 mandated disclosure of calorie counts, it did not compel endorsement of a particular message⁶⁴—the regulation only strives to ensure the disclosure of “factual and uncontroversial” information.⁶⁵ Therefore, the Court concluded that the mandatory disclosure of calories is not the type of compelled speech prohibited under the First Amendment.⁶⁶ The Court, citing precedent, also found that the rational basis test, rather than heightened scrutiny, was the proper standard to apply in deciding a commercial free speech claim wherein factual disclosures are required.⁶⁷ The Court weighed all the evidence, including the NYSRA's expert's testimony that there was no “scientific certainty” at the time to prove that disclosing the calorie information would reduce obesity.⁶⁸ Nonetheless, the Court found that the City's means for reducing obesity was rationally related to its stated purpose.⁶⁹ It agreed with the City's premise, stating:

Based on the evidence presented by the City, as well as common sense, it seems reasonable to expect that some consumers will use the information disclosed pursuant to Regulation 81.50 to select lower calorie meals when eating at covered res-

⁶¹ NOTICE TO REENACT § 81.50, *supra* note 53, at 14.

⁶² N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *1 (S.D.N.Y. Apr. 16, 2008).

⁶³ *Id.* at *13.

⁶⁴ *Id.* at *9.

⁶⁵ *Id.* at *8-9.

⁶⁶ *Id.* at *9.

⁶⁷ *Id.*

⁶⁸ *Id.* at *11-12.

⁶⁹ *Id.* at *12.

taurants and that these choices will lead to a lower incidence of obesity.⁷⁰

This litigation pushed back the effective date of the regulation to April 22, 2008. However, the NYSRA appealed and also requested a stay pending appeal.⁷¹ The City did not begin actual enforcement until July 19, 2008,⁷² once the appellate court issued its order denying a stay.⁷³

The NYSRA promptly appealed the district court's decision on both the preemption and First Amendment claims.⁷⁴ On February 17, 2009, the U.S. Court of Appeals for the Second Circuit affirmed the lower court's decision.⁷⁵ The NYSRA is considering whether to appeal the decision.⁷⁶

While New York City was struggling to implement a regulation that would withstand challenge, other jurisdictions jumped on the bandwagon.⁷⁷ For example, the King County (Washington) Board of Health had adopted a regulation on July 19, 2007, requiring County chain restaurants that had at least ten establishments nationwide to include calories of its foods, among other information, on the restaurant's menus and menu boards.⁷⁸ The regulation was later amended on April 17, 2008, to apply to chains of fifteen or more restaurants.⁷⁹ The Washington Restaurant Association cooperated with the King County

⁷⁰ *Id.* (citations omitted).

⁷¹ *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, No. 08-1892-cv (2d Cir. Apr. 18, 2008) (appeal docketed).

⁷² James Barron, *Restaurants That Lack Calorie Counts Now Face Fines*, N.Y. TIMES, July 19, 2008, available at <http://www.nytimes.com/2008/07/19/nyregion/19calorie.html?ref=nyregion> (last visited Mar. 1, 2010) ("the Second Circuit . . . denied the restaurant association's request to extend the no fine period beyond midnight [July 18, 2008].").

⁷³ *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, No. 08-1892-cv (2d Cir. Apr. 29, 2008) (order denying initial motion for a stay); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, No. 08-1892-cv (2d Cir. June 16, 2008) (order denying renewed motion for a stay).

⁷⁴ *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

⁷⁵ *Id.* at 136-37.

⁷⁶ See Frumkin, *supra* note 30.

⁷⁷ For a list of jurisdictions that had proposed or enacted bills through October 2008, see NCSL, *supra* note 25.

⁷⁸ KING COUNTY, WASH., BD. OF HEALTH REGULATION #07-01 (2007).

⁷⁹ KING COUNTY, WASH., BD. OF HEALTH REGULATION #08-02 (2008).

Board of Health when the Board drafted the amended regulation.⁸⁰

The City of Philadelphia had introduced its own bill,⁸¹ which was adopted by the City Council in November 2008⁸² and signed into law by Governor Michael Nutter in December 2008.⁸³ The law, which took effect on January 1, 2010, is similar to those passed in New York City and King County, where chain restaurants of fifteen or more outlets are required to post calories on their menus and menu boards.⁸⁴ However, Philadelphia's ordinance also requires posting the amount of saturated fat, trans fat, carbohydrates, and sodium,⁸⁵ thus making it "one of the strongest restaurant labeling laws in the nation."⁸⁶

However, when the City and County of San Francisco and the County of Santa Clara passed their own menu labeling ordinances,⁸⁷ the California Restaurant Association ("CRA") filed suits alleging that the ordinances were preempted by federal law.⁸⁸ Although the CRA demanded that these regulations be overturned, it was simultaneously sponsoring a bill before the

⁸⁰ Metro. King County Council, Restaurant Industry Agrees to Post Nutritional Information for Diners: Agreement Between Board of Health and Restaurant Industry First of Its Kind in Nation, Mar. 12, 2008, http://www.kingcounty.gov/council/news/2008/March/JP_menu.aspx.

⁸¹ See Phila., Pa., Bill No. 080167-A (2008), available at <http://webapps.phila.gov/council/attachments/5677.pdf>.

⁸² Michael Klein, *What's New on Menu? Labeling*, PHILLY.COM, Nov. 7, 2008, http://www.philly.com/philly/restaurants/20081107_What_s_new_on_menu_Labeling.html (last visited Mar. 1, 2010).

⁸³ *Philly Orders Up Strong Nutritional Labeling Law: Bill Covers More Items, Fewer Exemptions for Providing Fat and Calorie Info*, MSNBC, Dec. 18, 2008, available at <http://www.msnbc.msn.com/id/28299792/> [hereinafter MSNBC] (last visited Mar. 1, 2010).

⁸⁴ See Phila., Pa., Bill No. 080167-A, *supra* note 81 (to be codified in PHILA., PA., HEALTH CODE § 6-102(6.1), 308(1)).

⁸⁵ *Id.* (to be codified in PHILA., PA., HEALTH CODE § 6-308(1)(a)).

⁸⁶ MSNBC, *supra* note 83.

⁸⁷ S.F., CAL., HEALTH CODE art. 8 § 468.3 (2008), available at <http://library.municode.com/index.aspx?clientId=14136&stateId=5&stateName=California>; SANTA CLARA COUNTY, CAL., ORDINANCE No. NS-300.793 (2008), available at http://www.publichealthadvocacy.org/printable/CCPHA_SClaracountyordinance.pdf.

⁸⁸ See Cal. Rest. Ass'n, *CRA Sues to Overturn S.F. Menu Labeling Ordinance*, July 7, 2008, <http://www.calrest.org/go/CRA/news-events/cra-news/california-restaurant-association-committed-to-statewide-standard-for-nutritional-information-disclosure-sues-to-overturn-san-francisco-ordinance/index.cfm>; Cal. Rest. Ass'n, *CRA Files Second Menu Labeling Lawsuit*, July 23, 2008, <http://www.calrest.org/go/cra/news-events/newsroom/press-releases/cra-files-second-menu-labeling-lawsuit/> (last visited Mar. 1, 2010).

California State Legislature that would create uniform menu labeling standards within the state.⁸⁹ The effort to pass a statewide initiative was successful. On September 30, 2008, Governor Arnold Schwarzenegger signed into law Senate Bill No. 1420,⁹⁰ which requires that chain restaurants with at least twenty outlets in California post calorie count information on their menus and menu boards.⁹¹ This new law, being phased in commencing July 1, 2009 with full implementation by January 1, 2011,⁹² preempts any local regulations.⁹³ Thus, the City and County of San Francisco suspended and the County of Santa Clara repealed their respective ordinances.⁹⁴

The state and local regulations may be preempted should the federal government be successful in enacting a new health-care initiative.⁹⁵ Bills passed by both the U.S. Senate and the House of Representatives contain identical language regarding disclosure of calories “contained in [] standard menu item[s], as usually prepared and offered for sale” and “a succinct statement concerning suggested daily caloric intake as specified . . . by regulation.”⁹⁶ As do other proposed and existing state and local laws, the federal provision would apply to chain restaurants and other retail food establishments with twenty or more locations.⁹⁷

⁸⁹ *Id.*; see also Cal. Rest. Ass’n, *CRA Agrees to Statewide Standard for Menu Labeling*, Sept. 2, 2008, <http://www.calrest.org/go/CRA/news-events/newsroom/cra-agrees-to-statewide-standard-for-menu-labeling/> (last visited Mar. 1, 2010).

⁹⁰ S.B. 1420, 2007-2008 Sess. (Cal. 2008) (codified in CAL. HEALTH & SAFETY CODE § 114094 (West 2009)).

⁹¹ CAL. HEALTH & SAFETY CODE § 114094(a)(1), (b)(2) (West 2009).

⁹² *Id.* § 114094(b)(1), (c).

⁹³ *Id.* § 114094(j).

⁹⁴ S.F., CAL., HEALTH CODE art. 8 § 468.9 (2008), available at <http://library.municode.com/index.aspx?clientId=14136&stateId=5&stateName=California>; SANTA CLARA COUNTY, CAL., ORDINANCE No. NS-300.795 (2008), available at <http://www.sccgov.org/keyboard/attachments/BOS%20Agenda/2008/November%204,%202008/202166708/TMPKeyboard202467821.pdf>.

⁹⁵ See Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 2572(c) (2009) (as passed by House, Nov. 7, 2009); Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 4205(c) (2009) (as passed by Senate, Dec. 24, 2009).

⁹⁶ Affordable Health Care for America Act, § 2572(b)(H)(ii); Patient Protection and Affordable Care Act, § 4205(b)(H)(ii).

⁹⁷ Affordable Health Care for America Act, § 2572(b)(H)(i); Patient Protection and Affordable Care Act, § 4205(b)(H)(i). Establishments, such as smaller chains, not subject to the federal law may elect to be covered by the federal provisions and, thus, exempt themselves from state or local laws. Affordable Health Care for America Act, § 2572(b)(H)(ix); Patient Protection and Affordable Care Act, § 4205(b)(H)(ix).

These establishments would also have to make nutritional information available upon customer request.⁹⁸ The current federal proposals, however, take a step further and require that the calorie count of food sold from a vending machine that is operated by a person who owns or operates at least twenty such machines be displayed “in close proximity to each article of food.”⁹⁹ Although the restaurant industry initially opposed these disclosure provisions, the National Restaurant Association currently supports the proposed legislation as it would create a national uniform standard.¹⁰⁰ However, the National Automatic Merchandising Association continues to urge its members to lobby Congress with concerns over the costs of the form of required disclosures on vending machines.¹⁰¹

C. Big Mac Attack on Advertisements

“Big Mac attack!”¹⁰² Rather than being a sign of hunger pangs, nowadays this slogan would more likely refer to governmental attacks against the onslaught of advertisements by fast food establishments. While cities, counties, and states in the U.S. have required labeling on menus listing calories and have introduced laws on trans fat in their efforts to fight obesity, authorities in Europe have taken a slightly different track. In Europe, efforts have been directed at restaurants’ main marketing tool—their advertising campaigns.¹⁰³

⁹⁸ Affordable Health Care for America Act, § 2572(b)(H)(ii)(III); Patient Protection and Affordable Care Act, § 4205(b)(H)(ii)(III).

⁹⁹ Affordable Health Care for America Act, § 2572(b)(H)(viii); Patient Protection and Affordable Care Act, § 4205(b)(H)(viii).

¹⁰⁰ Richard Tannenbaum, *Health Care Provisions on Menu Board Calorie Counts Would Trump New York's Local Laws*, EXAMINER.COM (Nov. 16, 2009), <http://www.examiner.com/x-29918-NY-Environmental-Policy-Examiner~y2009m11d16-Health-care-provisions-on-menu-board-calorie-counts-would-trump-New-Yorks-local-laws> (last visited Mar. 1, 2010); Robert Pear, *Labels and Gay Benefits in Health Bill*, N.Y. TIMES, Nov. 7, 2009, available at http://www.nytimes.com/2009/11/08/health/policy/08benefits.html?_r=2 (last visited Mar. 1, 2010).

¹⁰¹ Nat'l Automatic Merchandising Ass'n, Legislative Alert (Jan. 15, 2010), available at http://www.vending.org/pdf/NAMA_January_15_2010_Leg_Alert.pdf.

¹⁰² “Big Mac attack” refers to a great desire to consume a Big Mac sandwich produced by McDonald’s restaurants.

¹⁰³ There have been challenges in the United States against fast food restaurants, but those have been in the form of lawsuits rather than legislation. See, e.g., *Pelman ex.*

Spain seems to have been a pioneer in regulating (albeit through voluntary programs) the advertisement to its citizens of foods deemed to cause obesity.¹⁰⁴ In 2006, Spain's Ministry of Health and Consumer Affairs lambasted Burger King for advertising its XXL burger on television.¹⁰⁵ The Ministry claimed that the advertising campaign contravened a national initiative against obesity.¹⁰⁶ Furthermore, the Ministry stated that the commercial violated the terms of a voluntary agreement entered into between the Ministry and the Spanish Federation of Hoteliers and Restaurateurs (FEHRCAREM),¹⁰⁷ of which Burger King is a member.¹⁰⁸ The agreement stipulated among other items that the members of the federation would not "encourage

rel. *Pelman v. McDonald's Corp.*, 396 F.3d 508, 510 (2d. Cir. 2005) (allegations that "McDonald's various promotional representations . . . create[d] the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily").

¹⁰⁴ Spain was the first country to create a plan against obesity after approval of the Global Strategy on Diet, Physical Activity and Health by the World Health Organization. Ministerio de Sanidad y Política Social, *Notas de Prensa*, (2006), <http://www.msc.es/gabinetePrensa/notaPrensa/desarrolloNotaPrensa.jsp?id=773> [hereinafter *Notas de Prensa*] (last visited Mar. 1, 2010). When Spain adopted its Strategy for Nutrition, Physical Activity and Prevention of Obesity (NAOS), part of its plan recognized that, notwithstanding a dearth of scientific information, advertisement of food products influenced diets. SPANISH MINISTRY OF HEALTH AND CONSUMER AFFAIRS, *STRATEGY FOR NUTRITION, PHYSICAL ACTIVITY AND PREVENTION OF OBESITY* 31 (2005) [hereinafter *NAOS*]. Admittedly, regulatory efforts in the U.S. and abroad have dealt with advertisements and obesity concerns; however, these have focused on advertisements to children, not adults. See, e.g., David Darwin, *Advertising Obesity: Can the U.S. Follow the Lead of the UK in Limiting Television Marketing Of Unhealthy Foods To Children?*, 42 VAND. J. TRANSNAT'L L. 317 (2009); Food Standards Agency, *Restrictions on TV Advertising of Foods to Children Come into Force*, Mar. 31, 2007, <http://www.food.gov.uk/news/newsarchive/2007/mar/tvads> (last visited Mar. 1, 2010); *EU Takes Aim at Junk Food Adverts*, BBC NEWS, Jan. 20, 2005, available at <http://news.bbc.co.uk/2/hi/business/4190313.stm> (last visited Mar. 1, 2010); *Burger King to End TV Child Ads*, *supra* note 12; Michael Kelly, *Taking Child Obesity Off the Menu*, IRISHTIMES.COM, Nov. 25, 2008, available at <http://www.irishtimes.com/newspaper/health/2008/1125/1227486541949.html> (last visited Mar. 1, 2010).

¹⁰⁵ Giles Tremlett, *Spain Tries to Remove Burger Ads*, GUARDIAN, Dec. 6, 2006, at 6, available at www.guardian.co.uk/media/2006/dec/06/spain.advertising (last visited Mar. 1, 2010).

¹⁰⁶ *Spain Chews Out Burger King*, MIAMI HERALD, Nov. 17, 2006, at 3C.

¹⁰⁷ FEHRCAREM is the acronym for Federación Española de Hostelería y Restauración y la Asociación Empresarial de Cadenas de Restauración Moderna—the Spanish Federation of Hoteliers and Restaurateurs. See *Notas de Prensa*, *supra* note 104.

¹⁰⁸ *Spain Chews Out Burger King*, *supra* note 106.

the consumption of huge individual portions”¹⁰⁹ and thus help in furthering the initiatives taken by the Spanish government to control obesity.¹¹⁰ In 2005, the same year the agreement was signed,¹¹¹ Spain had implemented the Strategy for Nutrition, Physical Activity and Prevention of Obesity (NAOS).¹¹²

The NAOS plan was devised to promote healthy lifestyles and eating habits among all of Spain’s citizens in recognition of the increased incidences of obesity and overweight.¹¹³ Studies reflected that 38.5% of the Spanish adult population was overweight and 14.5% was obese.¹¹⁴ Among children and young adults, 26.3% of the population was overweight and 13.9% were obese.¹¹⁵ These figures reflected that Spanish adults were in the median range for obesity among Europeans;¹¹⁶ however, obesity among young children was quite prevalent, placing Spain fourth among European countries after Italy, Malta, and Greece.¹¹⁷ Recognizing that childhood obesity would likely turn into adulthood obesity, Spain drafted a plan that would impact its entire constituency.¹¹⁸ The Spanish government also recognized that effective “implementation of the NAOS Strategy require[d] . . . the cooperation of all sections of society,”¹¹⁹ including the food and restaurant industries.¹²⁰

When Burger King aired its XXL burger commercials nearly two years later in Spain, the Health Ministry asserted that the fast food chain had breached its promise to cooperate with the NAOS plan.¹²¹ The Ministry alleged that the advertisement’s featured sandwich violated the voluntary agreement because it contained approximately 971 calories, almost one-half

¹⁰⁹ See NAOS, *supra* note 104, at 34.

¹¹⁰ Notas de Prensa, *supra* note 104.

¹¹¹ The agreement between the Ministry and FEHRCAREM was signed on January 19, 2005. *Id.*

¹¹² NAOS, *supra* note 104.

¹¹³ *Id.* at 17.

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 10-11.

¹¹⁸ *Id.* at 9, 17.

¹¹⁹ *Id.* at 21.

¹²⁰ *Id.* at 17, 31.

¹²¹ Notas de Prensa, *supra* note 104.

of the recommended daily allowance for an active teenager.¹²² Burger King did not heed the Ministry's repeated requests to pull the commercials off the air.¹²³ Rather, the company followed the XXL burger campaign with advertisements of its Double Whopper—further challenging the Health Ministry's demands.¹²⁴ Although Burger King eventually started airing new commercials promoting the quality of its burgers rather than their size, the company refused to agree not to promote larger burgers again in the future.¹²⁵

Subsequently, the Ministry terminated the voluntary agreement with FEHRCAREM, preferring to execute direct agreements with individual members of the federation.¹²⁶ Additionally and shortly thereafter, a law was enacted expanding the regulatory powers of the Spanish Food Safety and Nutrition Agency (AESAN). Among other matters, the new law permits AESAN to bring a cause of action to enjoin false or misleading advertisements to consumers concerning the nutritional value of food products.¹²⁷

Although Spain has been a leader in Europe, it has not been alone in its attempts to control advertisements of food products that are conducive to the obesity epidemic. For example, around the same time that Burger King was advertising its XXL burger in Spain, the company agreed to cease advertising of its products during children's television programming in the United Kingdom—preempting a possible ban by Ofcom, the U.K.'s media regulator.¹²⁸ Likewise, the European Union's

¹²² *Spain Chews Out Burger King*, *supra* note 106.

¹²³ Notas de Prensa, *supra* note 104; *see also Spain Chews Out Burger King*, *supra* note 106 (Burger King “had no plans to abandon the campaign.”).

¹²⁴ Tremlett, *supra* note 105, at 6.

¹²⁵ Notas de Prensa, *supra* note 104.

¹²⁶ *Id.*

¹²⁷ *Id.*; Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usuarios, B.O.E. 2006, 312, available at http://www.boe.es/es/bases_datos/doc.php?coleccion=iberlex&id=2006/22950 (last visited Mar. 1, 2010).

¹²⁸ *Burger King to End TV Child Ads*, *supra* note 12. Ofcom was established as a corporate body by the Office of Communications Act 2002. Ofcom is the regulator for the U.K. communications industries, with responsibilities across television, radio, telecommunications, and wireless communications services. Ofcom, Statutory Duties and Regulatory Principles, <http://www.ofcom.org.uk/about/sdrp/> (last visited Feb. 16, 2010).

commissioner of health and consumer affairs had called for voluntary measures from the food industry regarding advertisements aimed at children; otherwise, the commissioner threatened to introduce legislation to control such advertisements.¹²⁹ However, Spain's stance seems to be the first to target advertisements aimed at both children and adults alike.

D. Adopting BMI Measures

Body mass index (BMI) has long been extolled as a fairly easy and reliable method for determining whether a person may be overweight or obese. The BMI is a number calculated based on a person's weight relative to height.¹³⁰ The Centers for Disease Control and Prevention¹³¹ states that the use of BMI "is one of the best methods for population assessment of overweight and obesity . . . [because] it is inexpensive and easy to use."¹³² Standard weight categories have been created to interpret a person's BMI.¹³³ Adults with a BMI below 18.5 are underweight. A BMI between 18.5 - 24.9 indicates a normal weight status. However, an adult person with a BMI of 25.0 - 29.9¹³⁴ is considered overweight and any higher BMI reflects obesity.¹³⁵ Determining whether an individual may be overweight or obese helps

¹²⁹ *EU Takes Aim at Junk Food Adverts*, *supra* note 104.

¹³⁰ Ctrs. for Disease Control & Prevention, About BMI for Adults, http://www.cdc.gov/nccdphp/dnpa/bmi/adult_BMI/about_adult_BMI.htm [hereinafter About BMI] (last visited Feb. 16, 2010). The formulaic measure for BMI in the United States is based on pounds and inches—weight in pounds divided by height in inches squared and the result is multiplied by a factor of 703 ($703 \times \text{weight(lbs.)} / [\text{height(in.)}]^2$). *Id.* In countries which use the metric system, weight in kilograms is divided by height in meters squared with no multiplier ($\text{weight(kg)} / [\text{height(m)}]^2$). *Id.*

¹³¹ The Centers for Disease Control and Prevention is an agency of the U.S. Department of Health and Human Services. U.S. Dep't of Health & Human Servs., About HHS, <http://www.hhs.gov/about/index.html#agencies> (last visited Feb. 16, 2010).

¹³² About BMI, *supra* note 130.

¹³³ *Id.* Weight categories for adults are the same for men and women. However, the BMIs of children and teens are interpreted based on both sex and age. *Id.*

¹³⁴ The World Health Organization refers to this range as "pre-obese" in its International Classification of BMI. *Global Database*, *supra* note 7. It also divides the obese category into three classes—obese class I range is 30.00 - 34.99; obese class II range is 35.00 - 39.99; and obese class III is any BMI equal to or greater than 40.00. *Id.*

¹³⁵ About BMI, *supra* note 130. There also exist weight categories for those that are underweight, i.e., under an 18.50 BMI. Mid-thinness is categorized in a BMI range of 17.00 - 18.499. Moderate thinness ranges from 16.00 - 16.99. Severe thinness refers to anyone with a BMI below 16.00. *Global Database*, *supra* note 7.

in assessing that individual's increased risk for certain diseases and health problems such as hypertension, diabetes, cardiovascular disease and even some cancers.¹³⁶

Effective May 2007, the Chinese government added the BMI index to its list of criteria in determining whether a person would be eligible to adopt a Chinese child.¹³⁷ The new regulations stipulate that, among other criteria, adopting parents must not have a BMI of 40 or more.¹³⁸ Under the BMI categorizations, any such person would be class III or morbidly obese.¹³⁹

This measure was immediately met with much backlash, citing discrimination toward the obese.¹⁴⁰ Dr. David Katz, from the Yale University School of Medicine, labeled the measure as "misguided, discriminatory, and shameful."¹⁴¹ In a commentary for ABC News, Dr. Katz noted that it is well-established in medical literature that children generally resemble their parents and that obesity in children of obese parents is due to genes rather than quality of life.¹⁴² He pointed to a study published in the *New England Journal of Medicine* that found that there was no relation between the weight index of adoptive parents and adoptive children.¹⁴³

Notwithstanding the foregoing, the China Centre of Adoption Affairs ("CCAA") has stated that foreign adoption authorities and agencies have supported China's efforts to improve its adoption procedures in more quickly placing children with

¹³⁶ See About BMI, *supra* note 130.

¹³⁷ See U.S. Dep't of State, Intercountry Adoption: China, <http://adoption.state.gov/country/china.html> [hereinafter Intercountry Adoption] (last visited Feb. 16, 2010).

¹³⁸ *Id.*

¹³⁹ *Global Database*, *supra* note 8; Intercountry Adoption, *supra* note 137.

¹⁴⁰ See David L. Katz, *Chinese Babies for Adoption; Fat Need Not Apply*, Dec. 20, 2006, available at <http://www.davidkatzmd.com/admin/archives/Chinese%20Babies%20for%20Adoption.Katz.12-21-06.doc>; see also *Stricter Rules for Adoption by Foreigners*, CHINA DAILY, Dec. 26, 2006, available at http://www.chinadaily.com.cn/citylife/2006-12/26/content_767670.htm (last visited Mar. 1, 2010) (BMI index for adoption of Chinese children was "highly disputed").

¹⁴¹ Katz, *supra* note 140, at 1.

¹⁴² *Id.*

¹⁴³ *Id.*; see also A.J. Stunkard, et al., *An Adoption Study of Human Obesity*, 314 NEW ENG. J. MED. 193 (1986).

qualified parents.¹⁴⁴ The Chinese government's stated rationale for adopting the new criteria, including the BMI index, is that it wishes to place children in "the best possible environment to grow in."¹⁴⁵ The director of the CCAA stated that China wanted "to pick the most qualified so that our children can grow up in even better conditions."¹⁴⁶ He expressed concern that morbidly obese people are more prone to diseases and may have a shorter life expectancy.¹⁴⁷ The CCAA director said that the Chinese government "does not mean [to be] prejudiced against less qualified applicants, who can still apply."¹⁴⁸ Thus, the CCAA will consider applicants of those that do not meet the criteria, but only after reviewing the applications of those parents that qualify under the set criteria.¹⁴⁹ Nonetheless, those who are morbidly obese may not ultimately have that opportunity. Thus, in effect, morbidly obese applicants are being forced to lose weight or abandon pursuing the adoption of a Chinese child.

E. Waist Not

Although the BMI is one of the more widely accepted means of measuring obesity and thus the potential for serious health risks, recent studies have suggested that it is also the "poorest" for predicting cardiovascular health.¹⁵⁰ Waist size, not BMI, is a better indicator of a person's propensity for hypertension, diabetes, and high cholesterol.¹⁵¹ A study published in the *Journal of Clinical Epidemiology* concluded that waist circumference or waist to hip ratios are "more accurate predictors of obesity-related cardiovascular risk and [for] clinical diagnosis of meta-

¹⁴⁴ Guan Xiaofeng, *Adoption Rules Well Received*, CHINA DAILY, Aug. 4, 2007, available at http://www.chinadaily.com.cn/china/2007-08/04/content_5448235.htm (last visited Mar. 1, 2010).

¹⁴⁵ Intercountry Adoption, *supra* note 137.

¹⁴⁶ Guan Xiaofeng, *New Criteria Spelt Out for Adoption by Foreigners*, CHINA DAILY, Dec. 25, 2006, available at http://www.chinadaily.com.cn/china/2006-12/25/content_766420.htm (last visited Mar. 1, 2010).

¹⁴⁷ *Id.*

¹⁴⁸ *Stricter Rules for Adoption by Foreigners*, *supra* note 140.

¹⁴⁹ Intercountry Adoption, *supra* note 137.

¹⁵⁰ Tara Parker-Pope, *WAIST; Watch Your Girth*, N.Y. TIMES, May 13, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9A0DE7D7153CF930A25756C0A96E9C8B63> (last visited Mar. 1, 2010).

¹⁵¹ *Id.*

bolic syndrome.”¹⁵² Metabolic syndrome is a combination of medical disorders associated with elevated blood pressure, glucose, cholesterol, and abdominal fat.¹⁵³

On the heels of these studies, Japan enacted a law in early 2008 requiring companies and local governments to police the waist size of Japanese aged forty to seventy-four during their annual checkups or suffer financial consequences.¹⁵⁴ Men with waist circumferences larger than eighty-five centimeters (about 33.5 inches) and women with waistlines larger than ninety centimeters (about 35.5 inches), who also suffer from an obesity-related illness, will be given dieting guidance and re-educated as to eating habits if the their waist size does not shrink within six months.¹⁵⁵ Companies are measuring the waistlines of their employees, employees’ families, and retirees.¹⁵⁶

The aim of the Japanese government is to curb the rising costs of healthcare.¹⁵⁷ In furtherance of this goal, the government has enacted these measures in an effort to reduce obesity “by 10 percent over the next four years and 25 percent over the next seven years.”¹⁵⁸ Companies and local governments must meet certain targets to avoid financial penalties.¹⁵⁹ For example, certain companies “must measure at least 80 percent of their employees.”¹⁶⁰ If ten percent of those exceeding the prescribed measurements do not lose weight within the four-year time period, and twenty-five percent do not do so within the seven-year

¹⁵² Crystal Man Ying Lee, et al., *Indices of Abdominal Obesity Are Better Discriminators of Cardiovascular Risk Factors Than BMI: A Meta-Analysis*, 61 J. CLINICAL EPIDEMIOLOGY 646, 646 (2008).

¹⁵³ See, e.g., Mayo Clinic, *Metabolic Syndrome*, <http://www.mayoclinic.com/health/metabolic%20syndrome/DS00522> (last visited Feb. 16, 2010); Am. Heart Ass’n, *Metabolic Syndrome*, <http://www.americanheart.org/presenter.jhtml?identifier=4756> (last visited Feb. 16, 2010); Parker-Pope, *supra* note 150.

¹⁵⁴ Norimitsu Onishi, *Japanese Are Too Fat? A Tale of the Tape*, INT’L HERALD TRIB., June 13, 2008, at 1.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2.

time frame, the government could impose financial penalties, which could be in the millions.¹⁶¹

Some critics have asserted that the government has set unrealistic goals.¹⁶² These critics are concerned that too many Japanese will fail to meet the guidelines and that this, in turn, may lead to overmedication.¹⁶³ Others have suggested that controlling the high rate of smoking, rather than obesity of Japanese, should be the government's priority, as smoking is one of the causes of metabolic syndrome.¹⁶⁴ Nevertheless, Japan is moving forward with these preventive measures with the hope of reducing the waistlines and healthcare costs of its aging population.¹⁶⁵

F. Putting the Brakes on Fast Food—but No Way, San Jose!

The communities of the South Los Angeles area became subject to a one-year moratorium, effective September 14, 2008, on the establishment of new fast food restaurants in the area.¹⁶⁶ On July 29, 2008, the Los Angeles City Council unanimously approved an ordinance that would permit city planners to study alternatives to attracting greater and healthier food options for citizens of South Los Angeles.¹⁶⁷

With nearly one-half of the area restaurants being fast food outlets and “where rates of obesity and diseases related to it are disproportionately high,”¹⁶⁸ the City Council desired to “address the over-concentration of [commercial] uses which are detrimental to the health and welfare of the people of the

¹⁶¹ *Id.* On the other hand, however, those companies that exceed the targets may be rewarded by being able to lower their contributions to the healthcare system. *Id.*

¹⁶² *Id.* at 1-2.

¹⁶³ *Id.* at 2.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 1.

¹⁶⁶ L.A., CAL., ORDINANCE 180103 (2008) [hereinafter L.A. ORDINANCE].

¹⁶⁷ *Id.* The City is currently exploring “incentives to attract dining establishments, grocery stores and other options to enhance the quality of life for community stakeholders.” *Id.* at 1.

¹⁶⁸ Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 18, 2008, at D1. In the preamble to the ordinance, the City Council took note of a Los Angeles Times report which found that 45% of the South Los Angeles restaurants were fast food outlets as compared to only 16% in west Los Angeles. L.A. ORDINANCE, *supra* note 167, at 1.

community.”¹⁶⁹ Thus, the ordinance placed a moratorium on permits for any new fast food restaurants. The ordinance defines fast food restaurant as an establishment that serves food for eat-in or take-out, and which has “a limited menu, items prepared in advance or prepared or heated quickly, no table orders, and food served in disposable wrapping or containers.”¹⁷⁰ The ordinance is to remain in effect for one year, unless permanent regulations are adopted beforehand;¹⁷¹ the City Council may, however, extend the temporary moratorium for two additional six-month periods if it is found that the City is diligently pursuing permanent regulations.¹⁷² According to a *New York Times* article, it seems as if this may be the first time a government has prohibited the establishment of a particular type of restaurant for health rather than aesthetic reasons.¹⁷³

The City of San Jose, California, attempted to enact a similar ordinance shortly after the Los Angeles City Council approved its fast food moratorium.¹⁷⁴ On August 14, 2008, three San Jose council members recommended adoption of an ordinance establishing a city-wide moratorium on new fast food restaurants;¹⁷⁵ during this time, the City was to draft another ordinance which would prohibit opening new fast food restaurants within 1,000 feet from school sites.¹⁷⁶ The council members were concerned with the rapid growth of obesity rates, particularly among minority groups and children. The proposal specifically noted the “need to provide racially-diverse and low-income communities with healthier eating options and . . . to curtail the increase in high-fat, low-nutrition options like fast

¹⁶⁹ L.A. ORDINANCE, *supra* note 166, at 1.

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.* at 3.

¹⁷² *Id.* at 9.

¹⁷³ Severson, *supra* note 168.

¹⁷⁴ See San Jose, Cal., Memorandum to Rules and Open Government Committee re: Development of Conditional Zoning Prohibiting the Establishment of New Fast-Food Restaurants in Close Proximity to Schools, Aug. 14, 2008, *available at* http://www.sanjoseca.gov/clerk/CommitteeAgenda/Rules/20080820/Rules20080820_g2.pdf [hereinafter San Jose Memorandum].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* The San Jose Memorandum noted that other jurisdictions, such as Detroit, had enacted similar proposed ordinances regulating the establishment of fast food restaurants near schools. *Id.*

food.”¹⁷⁷ The proposal further focused on concerns over the devastating effects of fast food restaurants on children’s health.¹⁷⁸

Despite these legitimate concerns, the proposed moratorium was defeated.¹⁷⁹ The City’s Rules and Open Government Committee voted against the ban on new fast food restaurants, stating that this was not the solution to obesity prevention, although it did opt to pursue discussion among the City and schools regarding health and nutrition.¹⁸⁰

G. The Biggest Loser

In early 2008, Mississippi Representative W. T. Mayhall, Jr. proposed a bill that would prohibit restaurants from serving food to patrons deemed to be obese.¹⁸¹ Food establishments that seated five or more were subject to the restriction.¹⁸² If any such establishments repeatedly violated the proposed legislation, the Mississippi Department of Health would have been permitted to revoke a restaurant’s license.¹⁸³ The standard for determining a person’s obesity would be set by the Department of Health with input from the Mississippi Council on Obesity Prevention and Management.¹⁸⁴ Restaurants could then rely on the established criteria in deciding whom they could serve.¹⁸⁵

The bill’s co-author, Representative John Read, had expressed concern over Mississippi’s “number one problem.”¹⁸⁶ In 2007, Mississippi was ranked as having the highest obesity rate

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The San Jose Memorandum considered studies which found a correlation between obesity in children and fast food outlets. *Id.*

¹⁷⁹ Transcript of San Jose, Cal., Rules and Open Government Committee Meeting, Aug. 20, 2008, at 13, *available at* <http://www.sanjoseca.gov/clerk/transcript/committees/rules/r082008.pdf> [hereinafter San Jose Transcript].

¹⁸⁰ *Id.*

¹⁸¹ H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008) [hereinafter Miss. H.B. 282].

¹⁸² *Id.*

¹⁸³ *Id.* at 1-2.

¹⁸⁴ *Id.* at 1.

¹⁸⁵ *Id.*

¹⁸⁶ *Miss. Considers Restaurant Ban for Obese: Lawmaker from Fattest State in U.S. Says He Wants to Draw Attention to Obesity Epidemic*, CBS News, Feb. 5, 2008, *available at* <http://www.cbsnews.com/stories/2008/02/05/national/main3790418.shtml> (last visited Mar. 1, 2010).

in the United States; approximately thirty-two percent of the state's adult population was considered obese.¹⁸⁷

Notwithstanding the Representatives' intentions to bring attention to this epidemic, Mississippi House Public Health and Human Services Committee Chairman Steve Holland was quoted as saying about the bill: "It's dead on arrival at my desk."¹⁸⁸ Needless to say, the bill never moved through the committee.¹⁸⁹

II. WHAT'S THE SKINNY?

Should governments intervene in a matter that is basically about choice? It has been suggested that poor eating habits and little physical activity are the main causes of overweight and obesity.¹⁹⁰ Physical and emotional problems may contribute to weight gain as well.¹⁹¹ For example, low metabolism, depression, and even genetic predisposition may influence one's risk of obesity.¹⁹² However, excessive fat generally occurs because caloric intake is greater than what is burned.¹⁹³ Thus, a person's own behavioral choices may lead to overweight and obesity.

This type of behavioral choice may be differentiated from smoking. While smoking cigarettes may initially be a personal choice, evidence has proven that chemical additives in cigarettes often lead to nicotine addiction and incessant smoking, which in

¹⁸⁷ Trust for America's Health, Mississippi State Data, <http://healthyamericans.org/states/?stateid=MS> (last visited Feb. 16, 2010). The study conducted by Trust for America's Health and the Robert Wood Johnson Foundation is based on data reported during 2005-2007. *Id.* Mississippi's obesity rate increased during those three consecutive years. *Id.*

¹⁸⁸ Posting of isaaph to Sari-Saring Pinoy, <http://isaaph.wordpress.com/2008/02/06/its-dead-jim-mississippi-hb-282-doa-in-mississippi-legislature/> (Feb. 6, 2008).

¹⁸⁹ Miss. H.B. 282, *supra* note 181.

¹⁹⁰ See, e.g., eMedicineHealth, Obesity, http://www.emedicinehealth.com/obesity/article_em.htm ("Overeating and sedentary habits (inactivity) are the most important risk factors for obesity.") (last visited Feb. 16, 2010).

¹⁹¹ See, e.g., Weight-control Information Network, Understanding Adult Obesity, <http://www.win.niddk.nih.gov/publications/understanding.htm> (last visited Feb. 16, 2010).

¹⁹² *Id.*

¹⁹³ MedlinePlus, *supra* note 3; Global Database, *supra* note 7.

turn leads to health risks, such as lung cancer or cardiovascular disease.¹⁹⁴ Because chemicals introduced into cigarettes have influenced these risky behaviors, governmental intervention is warranted.¹⁹⁵ Given, however, that overeating appears thus far to be truly a personal choice, can a case be made for government regulation?¹⁹⁶

An argument in favor of legislative or regulatory action is that governments were created, among other reasons, to protect the health and welfare of its citizens. Given that overweight and obesity are one of the major causes of health problems throughout the world, governments should step in to fulfill one of its purposes.¹⁹⁷ This reasoning has not, however, persuaded everyone. Some find such arguments paternalistic and an unacceptable excuse for governmental intrusion on private lives. A member of the Stamford (Connecticut) Board of Representatives suggested as much, albeit in somewhat less than diplomatic terms. In opposing a proposed ordinance banning trans fats, Joseph Coppola, Jr., stated, "Government has to stay out of our lives It's about choice. If people are stupid enough to fill their diet with trans fats, they're just stupid."¹⁹⁸ Nonetheless, when polling is done, it appears that most Americans agree that

¹⁹⁴ NAT'L INST. ON DRUG ABUSE, CIGARETTES AND OTHER TOBACCO PRODUCTS, at 1-2 (Sept. 2008), available at <http://www.drugabuse.gov/pdf/infofacts/Tobacco08.pdf>; Am. Heart Ass'n, Nicotine Addiction, <http://www.americanheart.org/presenter.jhtml?identifier=4753> (last visited Feb. 16, 2010).

¹⁹⁵ See, e.g., Prabhat Jha, et al., *Tobacco Addiction*, in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 869, 873-74 (2d ed. 2006).

¹⁹⁶ Science may yet reveal that choice is not the only controlling factor. Moreover, as discussed in this article, some medical problems may also lead to overeating. See *supra* notes 190-91 and accompanying text.

¹⁹⁷ The problems associated with excess weight not only affect the individual but also affect the public as a whole as increased medical costs associated with overweight and obesity place an additional burden on the health care system. This concern was the impetus for Japan imposing its waist measurement program in trying to reduce incidences of metabolic syndrome. See *supra* notes 156, 164 and accompanying text. As Steve Levy, Suffolk County (NY) Council Executive, was quoted in discussing a county ordinance banning trans fats and requiring posting of calorie counts, "[i]t's for the taxpayer, too, because it's the taxpayer who also foots the bill for the consequences of obesity." Stacey Stowe, *Another Blow Against Trans Fats in Foods*, N.Y. TIMES, Feb. 22, 2009, available at <http://www.nytimes.com/2009/02/22/nyregion/long-island/22Rfats.html?ref=health> (last visited Mar. 1, 2010).

¹⁹⁸ Stowe, *supra* note 197.

government intervention is necessary in the fight against obesity.¹⁹⁹

Philosophical differences as to when governments should intervene for the health of its citizens will continue. One important underlying question that helps to focus the debate is whether these laws, if enacted, would or could actually improve such health. A study on methods of preventing and treating obesity suggested that community-wide policies would be helpful in influencing behavioral changes in eating habits and physical activity.²⁰⁰ In regard to a public hearing concerning its then-proposed trans fat ban, the New York City Department of Health and Mental Hygiene stated:

When clear and conclusive evidence of significant harm is well established, as is now the case for trans fat, it should spur action to protect the public. Had public policy been more rapidly introduced to eliminate lead in paint, require seatbelts, reduce drunk driving, warn of tobacco risks—to note but a few—thousands of lives would have been saved.²⁰¹

What should governments do, then, to combat overweight and obesity? As we have seen throughout this article, there exists a myriad of ways to attack this issue.²⁰²

Some jurisdictions have proposed legislation or enacted regulations that target what are deemed to be unhealthy foods, beverages, or substances in either. The most notable example is the banning of trans fats from restaurant fare.²⁰³ Spain targeted advertising campaigns that promoted high-calorie foods.²⁰⁴ The moratorium imposed in Los Angeles went even further by prohibiting establishment of new restaurants serving a

¹⁹⁹ Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh in on Wellness*, 5 IND. HEALTH L. REV. 185, 188 (2008).

²⁰⁰ Sharma, *supra* note 5, at 448.

²⁰¹ Memorandum from Lynn D. Silver, Assistant Comm'r, Bureau of Chronic Disease Prevention & Control, & Sonia Y. Angell, Dir., City Cardiovascular Disease Prevention & Control Program 7 (Dec. 4, 2006), available at <http://nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-comments-response.pdf>.

²⁰² One commentator suggested that governments use what she terms "redistributive, education, and community design efforts to encourage wellness." Baker, *supra* note 199, at 198.

²⁰³ See discussion *supra* Part I(A).

²⁰⁴ See discussion *supra* Part I(C).

particular type of food—fast food—even if temporarily.²⁰⁵ However, some attempts to regulate particular products for purposes of controlling obesity have been unsuccessful.²⁰⁶ For example, efforts have been made to impose taxes on junk food—often referred to as “fat taxes”—to deter consumption of unhealthy foods and beverages.²⁰⁷ A study published in 2000 reported that, in the United States, seventeen states and two cities had enacted laws imposing taxes on snacks, candy, soft drinks, or soft drink syrups.²⁰⁸ Even as recently as December 2008, New York Governor David A. Paterson proposed an 18% tax on sodas and other sugary drinks,²⁰⁹ which the Governor and his staff referred to as a tax on obesity.²¹⁰ The 2000 study, however, also revealed that eleven other similar laws had been repealed by then as well.²¹¹ Many of the repeals have been attributed to heavy lobbying on behalf of beverage and food manufacturers.²¹² Governor Paterson’s proposal is already being met with much criticism.²¹³ Barely two months after the tax initiative was announced, it was reported that the governor is

²⁰⁵ See discussion *supra* Part I(F).

²⁰⁶ Taxes have not necessarily been imposed merely for such altruistic purposes; other reasons have included the revenue these taxes generate. See Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 854 (2000); Chris L. Winstanley, Comment, *A Healthy Food Tax Credit: Moving Away from the Fat Tax and Its Fault-Based Paradigm*, 86 OR. L. REV. 1151, 1172-74 (2007).

²⁰⁷ Baker, *supra* note 199, at 190. But see *supra* note 206 and accompanying text.

²⁰⁸ Jacobson & Brownell, *supra* note 207, at 855. The report also noted that both Canada and several of its provinces had imposed taxes on the sale of soft drinks and snacks. *Id.* at 854.

²⁰⁹ See Clyde Haberman, *People Behaving Poorly May Be the Ones to Save the State from the Poorhouse*, N.Y. TIMES, Dec. 18, 2008, at A39, available at <http://www.nytimes.com/2008/12/19/nyregion/19nyc.html> (last visited Mar. 1, 2010).

²¹⁰ Nicholas Confessore, *Paterson Lowers Expectations on Soda Tax, Calling Approval Unlikely*, N.Y. TIMES, Feb. 13, 2009, at A17, available at <http://www.nytimes.com/2009/02/14/nyregion/14sodatax.html> (last visited Mar. 1, 2010).

²¹¹ *Id.* at 856. The study also reflected that, effective 2001, South Carolina repealed a tax on soft drink containers and syrups. *Id.*

²¹² Baker, *supra* note 199, at 191; Winstanley, *supra* note 206, at 1172.

²¹³ See Cara Matthews, *Soda Tax Part of Paterson's Wider Anti-Obesity Campaign*, LOHUD.COM, Jan. 9, 2009, <http://www.lohud.com/article/20090109/NEWS05/901090338/-1/rss01> (last visited Mar. 1, 2010). But see, e.g., Kelly Brownell, *Want a Healthier State? Save Gov. Paterson's Tax on Sugar Soda*, N.Y. DAILY NEWS, Feb. 17, 2009, available at http://www.nydailynews.com/opinions/2009/02/18/2009-02-18_want_a_healthier_state_save_gov_paterson.html (last visited Mar. 1, 2010) (urging passage of the soft drink tax).

now retreating a bit from his proposal.²¹⁴ A beverage industry lobbyist stated, "The governor is responding to the obvious hue and cry, not only from the food and beverage industry people, but from the general public, who have shown in poll after poll that this is not an idea that they feel is worth embracing."²¹⁵ Would a permanent moratorium on new fast food restaurants meet the same challenge or demise? Anyone proposing food-targeted legislation should be prepared for the onslaught of critics and lobbyists.

Others have tried to curb obesity by encouraging healthier lifestyles or discouraging unhealthy habits. The Chinese adoption policy is one such regulation. Interestingly, unlike the other regulations discussed in this article which aim to benefit those who are overweight and obese, the Chinese policy, in fact, adversely affects the morbidly obese who wish to adopt Chinese children; instead, its focus is to encourage healthy living on the part of the adoptive child.²¹⁶ Another means of encouraging healthier eating habits and increased physical activity is by enactment of regulations that are concomitant with zoning issues. For example, the moratorium on new fast food restaurants was enacted in Los Angeles, California, to give the City an opportunity to study and plan redevelopment of the South Los Angeles area,²¹⁷ "address the over-concentration of uses which are detrimental to the health and welfare of the people of the community,"²¹⁸ and provide healthier food options for the community.²¹⁹ A similar measure failed to pass in San Jose, California. During the moratorium period, the City was to prepare a change in its zoning code prohibiting establishment of new fast food restaurants within 1,000 feet of a school zone; its intent was to provide healthier food options for its citizens in a city where "fast food restaurants are disproportionately

²¹⁴ See, e.g., Confessore, *supra* note 210.

²¹⁵ *Id.* (quoting Richard Lipsky).

²¹⁶ See discussion *supra* Part I(D).

²¹⁷ Press Release, Jan C. Perry, City of L.A. Councilwoman, 9th Dist., South Los Angeles Fast Food Interim Control Ordinance Unanimously Approved by Los Angeles City Council: (July 29, 2008) (on file with author) [hereinafter Perry Press Release].

²¹⁸ L.A. Ordinance, *supra* note 166, at pmbl.

²¹⁹ Perry Press Release, *supra* note 217.

concentrated around schools in lower-income communities.”²²⁰ The City, however, decided to refer these health matters to the School/City Collaborative and the Healthy Neighborhood Venture Fund, both of which explore and address educational issues.²²¹ Some of these efforts may end up being too costly. Another example is the placement of solar-powered scales and the design and construction of exercise trails that the City of Jerusalem, Israel, is considering; any such endeavor entails a great expenditure of funds, especially for construction costs, that are not necessarily readily available.²²² Thus, although zoning seems promising, actual implementation of zoning efforts may not be feasible where much government funding is necessary. Perhaps these zoning efforts would be most cost-effective when a community is undergoing new urban planning rather than on a piecemeal basis.

This leads to the least costly efforts – educational interventions to curb obesity.²²³ It has been advocated that “the way to address obesity is through education, not legislation.”²²⁴ As Vice Admiral Richard H. Carmona, who served as United States Surgeon General, remarked during a 2003 speech, people need to be educated on “health literacy”—a phrase he coined and defined as “the ability of an individual to understand, access, and use health-related information and services.”²²⁵ Several of the regulations discussed in this article focused on educating the public, whether through dissemination of information or wellness programs. The calorie count mandate, in New York City and other U.S. jurisdictions, is the most evident educational intervention, as legislation requires posting of this information so that consumers may make informed on-

²²⁰ San Jose Memorandum, *supra* note 174.

²²¹ San Jose Transcript, *supra* note 179, at 12-13.

²²² Cal. Rest. Ass’n, *San Jose Legislative Update: Proposed Ban Defeated*, <http://www.calrest.org/go/cra/news-events/newsroom/san-jose-legislative-update-proposed-ban-defeated/?keywords=san%20jose%20legislative%20update> (last visited Feb. 16, 2010).

²²³ *Id.* at 192.

²²⁴ Feuer, *supra* note 52.

²²⁵ Vice Admiral Richard H. Carmona, U.S. Surgeon Gen., Remarks at the Am. Enter. Inst. Obesity Conference (June 10, 2003), *available at* <http://www.surgeongeneral.gov/news/speeches/obesity061003.htm> (last visited Mar. 1, 2010).

the-spot food consumption choices.²²⁶ Spain initiated a program promoting healthy eating; as part of that national program, it eventually introduced measures regarding the advertisement of nutritional value of foods.²²⁷ Japan's obesity measures took the form of a tape measure.²²⁸ In targeting waist size, the country is educating its people on the importance of reducing excess fat and healthy eating habits.²²⁹ Educational programs can be easily implemented to reach a wide audience.

For example, a campaign in Clarksburg, [West Virginia], encouraged consumers to switch from higher fat to lower fat milk to reduce intakes of saturated fat. After the 7-week campaign, the market share of 1% or fat-free milk increased from 18% to 41%. Most of that change was sustained for at least 1 year. The cost of the campaign, which used paid television and radio messages, was only 22 cents per resident.²³⁰

The author noted that "[a] campaign reaching about 200 000 [sic] people would cost about the same as 1 coronary-bypass operation."²³¹ Given the comparatively low cost coupled with the ability to affect many quite easily and effectively, educational-type legislation should be encouraged.

Thus, throughout the world, several different means have been introduced in an attempt to reduce the incidences of overweight and obesity. Some of these efforts have been voluntary in nature, but most are mandatory and impose penalties for violations of the same. Restaurants that violate New York City's ban on the use of trans fat or that fail to post calorie counts on menus or menu boards may be fined between \$200 and \$2000.²³² Violators of California's calorie count statute will be guilty of an infraction, punishable by a fine between \$50 and \$500.²³³ The City of Philadelphia likewise will assess a fine of no more than \$500 for failure to abide by its calorie count

²²⁶ See discussion *supra* Part I(B).

²²⁷ See discussion *supra* Part I(C).

²²⁸ See discussion *supra* Part I(E).

²²⁹ See discussion *supra* Part I(E).

²³⁰ Jacobson & Brownell, *supra* note 206, at 857 (citations omitted).

²³¹ *Id.*

²³² N.Y. CITY, N.Y., HEALTH CODE REGULATION § 3.11 (2008).

²³³ CAL. HEALTH & SAFETY CODE § 114094(k) (West 2009).

ordinance.²³⁴ Japan plans on imposing up to a 10% surcharge on companies that fail to reduce the waist sizes of employees and their dependents.²³⁵ The fast food moratorium in Los Angeles is a penalty in itself by not allowing establishment of new restaurants.²³⁶ And even the Chinese adoption restrictions penalize a class of persons—those who are morbidly obese—in preventing them from easily adopting children from that country.²³⁷

When regulations concern a matter of choice—excess eating—should they penalize individuals and entities? Or do voluntary programs or financial incentives work best?

Unfortunately, the Spanish program was voluntary in nature but somewhat ineffective, forcing Spain to adopt regulatory penalizing measures.²³⁸ Spain's Ministry entered into only voluntary agreements with restaurants without providing any monetary or other type of incentive.²³⁹

Thus, governments should consider adopting programs/regulations that provide incentives to participants, such as tax credits²⁴⁰ or subsidies. Several scholars have suggested that, in many contexts, a system of rewards, rather than penalties, may be more effective in inducing desired behavior and may reap greater benefits for all in the long run.²⁴¹

When a positive attitude is linked to one's change in behavior, the probability that the desired behavior will become a social

²³⁴ Phila., Pa., Bill No. 080167-A, *supra* note 82 (to be codified in PHILA., PA., HEALTH CODE § 6-308(7)).

²³⁵ See Justin McCurry, *Japanese Firms Face Penalties for Overweight Staff*, GUARDIAN, Mar. 19, 2008, available at <http://www.guardian.co.uk/world/2008/mar/19/japan> (last visited Mar. 1, 2010).

²³⁶ See discussion *supra* Part I(F).

²³⁷ See discussion *supra* Part I(D).

²³⁸ See discussion *supra* Part I(C).

²³⁹ See discussion *supra* Part I(C).

²⁴⁰ For an excellent discussion proposing a “refundable tax credit for money spent on qualifying healthy foods,” see Winstanley, *supra* note 206, at 1157.

²⁴¹ See, e.g., ROBERT B. BECHTEL & ARZA CHURCHMAN, HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY 530-31 (2002); Josef Falkinger, *Rewards Versus Penalties: On a New Policy Against Tax Evasion*, 19 PUB. FIN. REV. 67-79 (1991); Mary Agnes Carey, *Bigger Rewards--and Stronger Penalties--May Help Improve Health Care Quality*, Experts Say, CQ POLITICS, Sept. 9, 2008, available at <http://www.cqpolitics.com/wmspace.cfm?docID=hbnews-000002946414> (last visited Mar. 1, 2010).

norm increases. Positive attitudes are more likely to follow an incentive/reward approach than a disincentive/penalty intervention because the former approach is more likely to be perceived as “voluntary” and no threat to individual freedom. In fact, perceiving a threat to one’s freedom can lead to behavior contrary to compliance with a mandate.²⁴²

Lastly, the weightiest matter needs to be addressed – whether regulations to curb obesity should be enacted on a local or regional level, or should they be on a more widespread national scale (please forgive the puns)? This issue is highlighted in the extended litigation in New York City wherein the NYSRA challenged a locally enacted regulation based on a federal preemption claim.²⁴³ Likewise, in California, local regulations led to eventual state-wide preemption.²⁴⁴ Given the health crisis that the world is facing, legislation and programs at all levels should be allowed and encouraged. Preemption on a state-wide or national level, however, is warranted in those instances where local regulations would be so disparate as to discourage mobility or enforcement would cause more harm than good, and where a cost-benefit analysis would prove a more uniform regulation to be more effective. “[T]here is a need to change both policies and environments so that these are supportive of entire communities in eating healthy foods.”²⁴⁵ Community programs and regulations are thus essential from the top down and from the bottom up.

CONCLUSION

There is no “magic bullet”²⁴⁶ in legislating to prevent overweight and obesity in the world’s population. And there is no evidence yet to show whether any of the regulations have, in fact, affected people’s eating habits. One writer suggests that

²⁴² BECHTEL & CHURCHMAN, *supra* note 241, at 531 (citations omitted).

²⁴³ See discussion *supra* Part I(B).

²⁴⁴ See discussion *supra* Part I(B).

²⁴⁵ Sharma, *supra* note 5, at 448.

²⁴⁶ N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 354 (In challenging the New York City calorie count ordinance, the NYSRA argued that “caloric intake is just one component of a healthy lifestyle, and its reduction is not a ‘magic bullet’ to combat obesity.”).

New Yorkers are paying attention to the calorie count postings and “switching to a healthier lifestyle,”²⁴⁷ but this assessment was based on mostly anecdotal evidence.²⁴⁸ As these regulations have only recently been implemented, more time is needed to study their impact. Even then, it may be difficult to determine whether any particular legislation was indeed effective in preventing or reducing incidences of overweight and obesity.

And there are skeptics. For example, some question whether Japan’s program to reduce metabolic syndrome by forced waist measurements “is little more than a fad that will, in time, burn out.”²⁴⁹ In this regard, a Japanese professor of medical informatics was quoted as saying: “[T]he government will cancel the ‘metabo’ exams in a few years, after realising [sic] that they won’t save any money.”²⁵⁰ Others suggest that companies will find other means to market foods that have been targeted by some of these regulations by, for instance, reducing the price on higher calorie items.²⁵¹

Notwithstanding the cynics and critics, whatever can fairly be done should be done to lessen this health crisis. “While menu labeling [and other regulations] alone will not solve the problem of obesity, [they can each] play a vital role in a multipronged effort to combat the epidemic.”²⁵²

²⁴⁷ Eduardo Porter, Editorial, *About That Doughnut*, N.Y. TIMES, Aug. 30, 2008, at A18, available at <http://www.nytimes.com/2008/08/30/opinion/30sat4.html> (last visited Mar. 1, 2010).

²⁴⁸ *Id.*

²⁴⁹ Alex Wood, *Japan Addresses Incidence of "Metabolic Syndrome"*, CLINICA, Jan. 13, 2009 (on file with author).

²⁵⁰ *Id.*

²⁵¹ See, e.g., Porter, *supra* note 247.

²⁵² Harold Goldstein & Patricia Wakimoto, *Menu Labeling Will Help San Franciscans Lighten Up*, S.F. CHRON., Feb. 7, 2008, at B7, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/07/ED1GUSSD3.DTL> (last visited Mar. 1, 2010).

COMMENT

WITHIN HER SPHERE: DETERMINING A WOMAN'S PLACE IN THE CONSTITUTIONAL ORDER UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE

INTRODUCTION

As lawyers, we generally think about the Fourteenth Amendment in terms of the Due Process and Equal Protection Clauses. This is not unusual given the narrow construction attributed to the Privileges and Immunities Clause in *Slaughter-House*.¹ As a result, most judicial interpretation deals with the Equal Protection and Due Process Clauses. However, sixty-five years after liquidating the Privileges and Immunities Clause in *Slaughter-House*, the Court struck down a state law on the ground that it violated the Privileges and Immunities Clause in *Saenz v. Roe*.² While the decision did not signal a full-blown revival of the Privileges and Immunities Clause, it did seem to indicate a willingness of the Court to reconsider the Clause in the context of modern constitutional law.³

The Court's resurrection of the Privileges and Immunities Clause, if even for just a moment, begs the question "What if?" Suppose that the Court in *Slaughter-House* had not misconstrued the fundamental purpose of the Privileges and Immunities Clause and had correctly read and applied the Clause as a guarantee of fundamental rights. How would interpreting the

¹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

² Kevin C. Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter House Cases*, 109 YALE L.J. 643, 645 (2000). In *Saenz*, the Court breathed new life into the Privileges and Immunities Clause when it held that a state law limiting welfare benefits for new residents violated the Fourteenth Amendment. 526 U.S. 489, 492 (1999).

³ Newsom, *supra* note 2, at 646. The Privileges and Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" U.S. CONST. amend. XIV, § 1.

Privileges and Immunities Clause of the Fourteenth Amendment as a guarantee of fundamental rights that no government, state or federal, could take away have impacted the constitutional landscape? One person interested in the answer to that question would be Myra Bradwell. Bradwell brought the first women's rights case under the Fourteenth Amendment, which was decided the day after the Court handed down its first Fourteenth Amendment decision in *Slaughter-House*.⁴

Ultimately, the Court relied on the recent *Slaughter-House* decision when it held that the Privileges and Immunities Clause of the Fourteenth Amendment did not protect Bradwell's right to practice law.⁵ However, had the *Slaughter-House* decision been based on a broader interpretation of "privileges and immunities" as fundamental civil rights belonging to all citizens, rather than a collection of narrowly circumscribed rights associated with national citizenship, the Court could have more easily ruled in favor of Myra Bradwell.⁶

As Justice Thomas pointed out in his dissenting opinion in *Saenz*, revisiting the Privileges and Immunities Clause of the Fourteenth Amendment requires answering two tough questions.⁷ First, what did the Framers of the Fourteenth Amendment believe privileges and immunities meant?⁸ Second, how would application of the Privileges and Immunities Clause impact equal protection and substantive due process jurispru-

⁴ LESLIE F. GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN* 4 (2d ed. 1988). Although the Court handed down the *Bradwell* decision after *Slaughter-House*, *Bradwell's* oral arguments were presented to the Court more than a year before those of *Slaughter-House*. Anne Ashmore, U.S. SUPREME COURT LIBRARY, DATES OF SUPREME COURT DECISIONS AND ARGUMENTS 110 (2006), available at <http://www.supremecourtus.gov/opinions/datesofdecisions.pdf>. Therefore, the question of whether the right to engage in a chosen profession was a fundamental right guaranteed by the Privileges and Immunities Clause was certainly on the minds of the Supreme Court Justices deciding *Slaughter-House*. See *Slaughter-House*, 83 U.S. (16 Wall.) at 119 (Bradley, J., dissenting). Perhaps the narrow interpretation of the Privileges and Immunities Clause with respect to the butcher's choice of occupation stemmed from the apprehension that a broad interpretation would necessarily emancipate women. Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89, 116 n.159 (1994).

⁵ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873).

⁶ Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1527 (1986).

⁷ 526 U.S. at 527 (Thomas, J., dissenting).

⁸ *Id.*

dence?⁹ The meaning of privileges and immunities has been a source of robust scholarly debate, and the only definitive answer given by legal scholars is that the Privileges and Immunities Clause does not mean what the Court in *Slaughter-House* said it meant.¹⁰ However, this paper explores the idea that the Privileges and Immunities Clause guarantees a baseline of fundamental rights that no government may take away.¹¹ Furthermore, this paper contends that the Privileges and Immunities Clause cannot be accurately defined without considering the overarching purpose of the Fourteenth Amendment—eradication of “Black Codes,” which employed State power to limit the newly freed slave’s role in society.¹² The Amendment’s fundamental purpose supports the idea that an individual’s right to shape their role in society is inherent in the fundamental rights guaranteed by the Privileges and Immunities Clause.¹³ Therefore, the Amendment’s reach could logically be extended to laws that sought to confine women to their roles as wife and mother.¹⁴

The answer to the Justice Thomas’ second question is framed in the context of the *Bradwell* decision. This paper contends that had the Privileges and Immunities Clause been interpreted as a guarantee of fundamental rights, including the right to choose how you participate in and contribute to the community through a chosen occupation, the Court would have ruled in favor of *Bradwell* and could have avoided the mental gymnastics required to eliminate arbitrary discrimination and protect substantive rights under the Equal Protection and Due Process Clauses.¹⁵

⁹ *Id.* In *Troxel v. Granville*, Justice Thomas suggested that a revived Privileges and Immunities Clause might replace the substantive due process doctrine. 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

¹⁰ *Saenz*, 526 U.S. at 523 n.1.

¹¹ David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 917 (2007).

¹² *Id.* at 932-33.

¹³ *Id.* at 936.

¹⁴ *See id.*

¹⁵ *See id.* at 909.

I. THE BRADWELL CASE THROUGH THE EYES OF SLAUGHTER-HOUSE

American women who sought entrance into professional fields such as law and medicine were confronted with two common prejudices.¹⁶ One was the widely held belief that females lacked the intellect required by professional occupations that relied primarily on mental prowess.¹⁷ The second prejudice stemmed from the Victorian-era belief that respectable women did not work outside the home.¹⁸ Both prejudices acted to force women into the narrow social roles of mother and homemaker and enshrined their position within the domestic sphere.¹⁹

The Civil War created a shortage of young men entering professional fields such as medicine and law.²⁰ In the absence of young men, a number of women began reading law in the offices of their fathers and husbands.²¹ However, these Civil-War Era "Rosie the Riveters" wanted to keep working after the war.²²

Women found entrance into the legal profession more difficult than other professional fields such as medicine.²³ The difficulty originated from a common law regime that denied women the right to own property or enter into contracts and the incompatibility between practicing law and 19th century ideas about a woman's role in society.²⁴ At common law, women became legal non-entities upon marriage.²⁵ The law imposed a "disability of coverture" upon married women, which prohibited them from owning property and rendered them incapable of making binding contracts without their husbands' consent.²⁶ However, the enactment of Married Women's Property Acts during the late

¹⁶ BARBARA J. HARRIS, *BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY* 3 (1978).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Gans, *supra* note 11, at 930.

²⁰ Olsen, *supra* note 6, at 1523.

²¹ *Id.*

²² *Id.*

²³ HARRIS, *supra* note 16, at 110.

²⁴ *Id.*

²⁵ *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

²⁶ Olsen, *supra* note 6, at 1524.

19th century emancipated women from the disability of coverture imposed by the common law.²⁷

Women's traditional occupation of the domestic sphere also made entrance into the legal profession difficult. However, society's predilection for viewing women as wives and mothers made entrance into the medical field easier as the practice of medicine was seen as a natural extension of their role as homemaker.²⁸ Female lawyers, on the other hand, were clearly intruding upon a profession that had been exclusively reserved for men.²⁹

The first female to seek admission to the bar was Myra Bradwell.³⁰ The Illinois Supreme Court conceded Bradwell's professional qualifications, but refused her admission to the bar on the basis of her status as a married woman.³¹ The court reasoned that Bradwell's inability to enter into contracts with her clients would inhibit her ability to effectively practice law.³² Bradwell responded with a brief to the court arguing that the Illinois Married Women's Property Act, which removed the disability of coverture, enabled her to enter into contracts with her clients to the extent required to practice law.³³ The court acknowledged that it had ignored the effect of the Married Women's Property Act, but concluded that Bradwell's sex, independent of the removal of the disability of coverture, was a sufficient ground on which to deny her license to practice law.³⁴ The court further asserted that, although the attorney licensing statute did not expressly exclude women, admission of women to the bar did not comport with legislative intent.³⁵

Bradwell engaged Matthew Carpenter, a Senator from Wisconsin and well-known constitutional lawyer, to appeal her case

²⁷ *Id.*

²⁸ See HARRIS, *supra* note 16, at 110.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Olsen, *supra* note 6, at 1523.

³² *Id.* at 1524.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* The Illinois Supreme Court asserted that at the time the statute was passed, the general understanding of social roles assigned the sexes to "different spheres of action" and that the idea that men should "make, apply, and execute laws" was an "axiomatic truth." *Id.* at 1524-25 (quoting *In re Bradwell*, 55 Ill. 535, 539 (1869)).

to the United States Supreme Court.³⁶ The question presented to the Court was whether the right to practice law was a privilege or immunity conferred on a United States citizen under Section 1 of the Fourteenth Amendment.³⁷

In his argument before the Court, Carpenter pointed to several Supreme Court opinions supporting the conclusion that the legal profession, like the medical profession, was a vocation open to every United States citizen.³⁸ Carpenter conceded that the legislature was permitted to prescribe certain qualifications related to age, character, and learning; however it could not, under the Fourteenth Amendment, exclude a class of citizens from admission to the bar.³⁹ For example, Carpenter argued that, under the Privileges and Immunities Clause, a state legislature could not require that a candidate applying for admission to the bar be a white citizen because such a qualification would exclude blacks without regard to their age, character, or intelligence.⁴⁰ Employing the race-sex analogy, he further asserted that if Section 1 of the Fourteenth Amendment protected the privileges and immunities of black citizens from abridgement by states, then it protected every citizen, "black or white, male or

³⁶ *Id.* at 1525. Carpenter also represented the State of Louisiana against the independent butchers in *Slaughter-House*. *Id.* at 1526. The Court held for the State; therefore, Carpenter's victory in *Slaughter-House* ultimately led to his defeat in *Bradwell*. *Id.* at 1527 n.40. However, the position the Court ultimately took in deciding *Slaughter-House* differed from that argued by Carpenter. Carpenter based his arguments in favor of the State's creation of a slaughter-house monopoly on a broad understanding of state police power rather than on a narrow interpretation of the Privileges and Immunities Clause. Olsen, *supra* note 6, at 1527. Carpenter employed the same understanding of police power in *Bradwell*, arguing that the State may prescribe qualifications for admission to the bar, provided that those regulations were reasonable and not a guise to arbitrarily exclude a class from the profession. *Bradwell*, 83 U.S. (16 Wall.) at 135 (argument of counsel). Under Carpenter's view, state regulations promoting public health and setting reasonable standards for entrance into a profession clearly fell within the State's police power. See Olsen, *supra* note 6, at 1527 n.39.

³⁷ *Bradwell*, 83 U.S. (16 Wall.) at 133 (argument of counsel).

³⁸ *Id.* at 124. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 321 (1867) (stating that the pursuit of happiness requires that "all avocations, all honors, all positions are alike open to every one"); *Ex parte Garland* 71 U.S. (4 Wall.) 333, 378 (1867) (stating that attorneys are "officers of the court, admitted . . . upon evidence of their possessing sufficient legal learning and fair private character").

³⁹ *Bradwell*, 83 U.S. (16 Wall.) at 135 (argument of counsel).

⁴⁰ *Id.*

female.”⁴¹ Therefore, no matter what the state legislature contemplated when enacting its attorney licensing statutes, the Constitution protected the right of United States citizens, irrespective of their color or gender, to engage in their chosen profession.⁴²

The Court ruled against Bradwell the day after deciding *Slaughter-House*.⁴³ In *Slaughter-House*, the Court narrowly construed the Privileges and Immunities Clause and held that the Clause protected only those rights associated with national citizenship.⁴⁴ Applying the *Slaughter-House* decision, the *Bradwell* Court held that the right to admission to the bar was not a privilege or immunity protected under the Fourteenth Amendment.⁴⁵

In his infamous concurring opinion, Justice Bradley echoed the sentiment of the Court when he stated that the right of women to engage in *any* profession of their choosing was not a privilege or immunity protected under the Fourteenth Amendment.⁴⁶ Bradley went on to argue that the law, as well as nature, had long recognized that men and women occupied separate spheres in society.⁴⁷ Under Bradley’s “separate-spheres” mentality, women, because of their timid and delicate nature,

⁴¹ *Id.* at 136. The women’s suffrage movement often invoked the race-sex analogy, which demonstrated how sex discrimination resembled forms of race discrimination that the Court had already invalidated under the Fourteenth Amendment. PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 1184-85 (5th ed. 2006). The analogy became an invaluable tool in the 1960s as the women’s movement worked to persuade the courts to strike down laws discriminating on the basis of sex. *Id.*

⁴² *Bradwell*, 83 U.S. (16 Wall.) at 137 (argument of counsel).

⁴³ Olsen, *supra* note 6, at 1525.

⁴⁴ John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1429 (1992).

⁴⁵ *Bradwell*, 83 U.S. (16 Wall.) at 139.

⁴⁶ *Id.* at 140 (Bradley, J., concurring). Justice Bradley’s statements in *Bradwell* appear to contradict those that he made in his dissenting opinion in *Slaughter-House*. Bradley asserted that the right to “[engage] in any lawful employment for a livelihood . . .” was indeed a privilege or immunity. *Slaughter-House*, 83 U.S. (16 Wall.) at 119 (Bradley, J., dissenting). Additionally, Bradley believed that “a law which prohibit[ed] a large class of citizens from adopting a lawful employment . . .” violated the Fourteenth Amendment. *Id.* at 122. While Bradley clearly believed that the Privileges and Immunities Clause encompassed the right to choose one’s profession, he firmly believed that the Clause was not intended to interfere with a woman’s “paramount destiny.” *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

⁴⁷ *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

rightly occupied a sphere of domesticity leaving men to act as provider and protector.⁴⁸ While Bradley did appear to acknowledge the changing roles of women in society, he concluded that it would be the responsibility of the legislature, not the Court, to take the lead in enacting laws promoting the advancement of women.⁴⁹

As a result of the narrow interpretation of the Privileges and Immunities Clause in *Slaughter-House*, the Court refused to uphold the assertion that the Clause was broad enough to emancipate women.⁵⁰ Therefore, lawyers challenging sex discrimination abandoned the Privileges and Immunities Clause in favor of the Equal Protection and Due Process Clauses.⁵¹

II. UNCOVERING THE MEANING OF PRIVILEGES & IMMUNITIES

Law students quickly learn to disregard the Privileges and Immunities Clause of the Fourteenth Amendment.⁵² We are taught that the Court's decision in *Slaughter-House*, effectively wrote the provision out of the text. While the Privileges and Immunities Clause is quickly dismissed, entire chapters of constitutional law casebooks are devoted to the Court's interpretation of the Due Process and Equal Protection Clauses, which

⁴⁸ *Id.*

⁴⁹ *Id.* at 142. The legislature eventually did take action at the prompting of none other than Myra Bradwell. Bradwell assisted in the drafting of a reform bill that granted women substantially equal employment rights in the state of Illinois. Olsen, *supra* note 6, at 1529. The bill passed on March 22, 1872, and took effect on July 1, 1872, nine and a half months before the Supreme Court decided *Bradwell*. *Id.* Myra Bradwell never reapplied to the bar, but on June 4, 1873, Alta Hulett became the first woman lawyer in Illinois. *Id.* at 1530.

⁵⁰ See BREST, *supra* note 41, at 1180.

⁵¹ Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1169 (1988). Unfortunately, it would take a century of Fourteenth Amendment jurisprudence for the Court to hold that gender-based discrimination violated the Amendment. See *Reed v. Reed*, 404 U.S. 71 (1971) (automatic preference of men over women in estate administration violated the Equal Protection Clause).

⁵² In fact, recent law school graduates preparing for the bar examination are advised that "Privileges or Immunities Clause" will never be the right answer. Newsom, *supra* note 2, at 646.

bear the substantive burden intended for the Privileges and Immunities Clause.⁵³

While we all know why the Privileges and Immunities Clause is absent from modern constitutional law, the question of what the clause means has led to considerable debate in the academic community.⁵⁴ Consistent with the view of the Constitution as a “great outline[],”⁵⁵ the Framers did not list a specific set of rights they wanted to protect under the Fourteenth Amendment.⁵⁶ Therefore, understanding what the drafters of the Fourteenth Amendment intended “privileges and immunities” to encompass requires considering whether there was a generally accepted meaning of “privileges and immunities” at the time of ratification.⁵⁷ In an effort to uncover the generally accepted meaning of “privileges and immunities” and, consequently, to discern the Framers’ intended meaning of the phrase in the context of the Fourteenth Amendment, this section will consider discussions contained in the ratification debates along with judicial interpretation of privileges and immunities.

A. Ratification Debates

The Fourteenth Amendment was drafted in response to “Black Codes,” which worked to discriminate against the newly

⁵³ Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 1-2 (1998).

⁵⁴ Many scholars have adopted the belief echoed by the Fourteenth Amendment’s leading framer, John Bingham, that the Privileges and Immunities Clause encompasses the rights contained in the first eight amendments to the Constitution. Harrison, *supra* note 44, at 1393. Professor Bernard Siegan maintained that the Clause embodied natural rights similar to those ultimately captured under the substantive due process jurisprudence. *Id.* at 1394. Conservative scholars, like Professor Raoul Berger, argue that the meaning of the Clause is “unknown and unknowable.” Shankman & Pilon, *supra* note 53, at 6. Author and former judge Robert Bork contends that the words meant “very little to those who adopted them” and effectively relegates the Privileges and Immunities Clause to boilerplate. *Id.* at 5. However, the contention that “privileges and immunities” amount to little more than meaningless boilerplate seems incorrect given the discussion of the meaning of the clause in the 1866 ratification debates where Senator Jacob Howard stated that “it is certain the clause was inserted in the Constitution for some good purpose.” CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

⁵⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁵⁶ Gans, *supra* note 11, at 914.

⁵⁷ Shankman & Pilon, *supra* note 53, at 7.

freed slaves.⁵⁸ The Reconstruction Congress first sought to eradicate the discrimination stemming from Black Codes by passing the Civil Rights Act of 1866.⁵⁹ The Act overruled the holding in *Dred Scott*⁶⁰ by prohibiting states from denying citizenship to blacks and extending civil rights to a class to which *Dred Scott* had denied those rights.⁶¹ The civil rights enumerated under the Act included rights pertaining to "personal integrity, property, contract, and access to the courts."⁶² However, the Act raised questions of constitutional authority, which ultimately gave rise to the drafting of the Fourteenth Amendment, which would, in effect, constitutionalize the Civil Rights Act of 1866.⁶³

The remarks of the Congressmen who proposed the Fourteenth Amendment provide evidence of legislative intent and the original understanding of privileges and immunities.⁶⁴ While the debates do not provide an exhaustive list of fundamental rights encompassed by the Privileges and Immunities Clause, the Bill of Rights and Justice Washington's catalogue of rights in *Corfield v. Coryell*⁶⁵ seem to serve as starting point. The limited attention paid to specifically defining the Privileges and Immunities Clause could also be attributed to a belief that it embodied the same rights set forth in the Civil Rights Act, which had already been heavily debated and enacted.⁶⁶ Despite the lack of a concrete definition of privileges and immunities, the record supports the idea that the Framers intended the clause to function as the "substantive heart" of the Fourteenth Amendment.⁶⁷

⁵⁸ *Id.* at 24-25.

⁵⁹ *Id.*

⁶⁰ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁶¹ Shankman & Pilon, *supra* note 53, at 25.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1084 (2000).

⁶⁵ 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

⁶⁶ BREST, *supra* note 41, at 307. The Civil Rights Act of 1866 extended to all citizens a litany of fundamental rights including, the right to make and enforce contracts, sue and be sued, give evidence, and own and manage property. *Id.* at 303.

⁶⁷ Shankman & Pilon, *supra* note 53, at 26.

In his introduction of the Fourteenth Amendment to the Senate, Jacob Howard admitted that even though privileges and immunities could not be defined entirely or precisely, they at least included those rights enumerated by Justice Washington in *Corfield v. Coryell*.⁶⁸ However, Howard contended that the fundamental rights secured by the Privilege and Immunities Clause did not stop there. In his view, the Clause also included the individual rights guaranteed by the first eight amendments of the Constitution.⁶⁹ Based on these statements, Howard appeared to view the Privileges and Immunities Clause as affording citizens substantive rights rather than providing protection against discrimination, a responsibility he delegated to the remaining clauses.⁷⁰

Representative John Bingham, the principal drafter of Section 1 of the Fourteenth Amendment, explained that the first section's purpose was "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within the jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."⁷¹ While Bingham's reference to "inborn" or natural rights, lends support to the argument in favor of a fundamental-rights reading of the Privileges and Immunities Clause, it is not entirely clear whether he was referring to the Privileges and Immunities Clause or Section 1 as a whole.⁷² However, during the 1871 Civil Rights Act debates, Bingham clarified his position on the scope and meaning of privileges and immunities when he stated, "the privileges and immunities of citizens . . .

⁶⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

⁶⁹ *Id.*

⁷⁰ Christopher R. Green argues that the Privileges and Immunities Clause could function as *both* a guarantee of substantive rights *and* a generic anti-discrimination clause. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 252 n.160 (2009).

⁷¹ CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

⁷² See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 32 n.100 (2008). In fact, Bingham's reference to "every person within its jurisdiction" strongly suggests that he may have been referring to the Equal Protection Clause. See *id.* at 32 n.100.

are chiefly defined in the first eight amendments to the Constitution of the United States."⁷³

Despite the extensive debate surrounding the adoption of Section 1 of the Fourteenth Amendment, very little discussion centered around the Amendment's affect on women's civil rights.⁷⁴ The discussion of women's rights under the Fourteenth Amendment focused almost exclusively on whether the Amendment guaranteed the right to vote.⁷⁵

While the Framers intended the Privileges and Immunities Clause to guarantee every citizen a set of fundamental rights, they apparently did not intend the Amendment to upset state laws restricting married women's right to own property.⁷⁶ At the time of the Fourteenth Amendment's ratification, state laws that imposed a disability of coverture and limited the civil rights of married women still existed in almost every state.⁷⁷ While defending an early draft of the Fourteenth Amendment, John Bingham assured his fellow congressmen that the Amendment would not entitle married women to own property.⁷⁸ However, immediately following that assurance, Bingham stated, "[t]hose rights which are universal and independent of all local State legislation belong, by the gift of God, to every woman, whether married or single. The rights of life and liberty are theirs whatever States may enact."⁷⁹ Even though there is

⁷³ CONG. GLOBE, 42nd Cong., 1st Sess. 84 (1871).

⁷⁴ Rierson, *supra* note 4, at 106.

⁷⁵ Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 n.12 (1991). Senator Jacob Howard contended that a person bound by the laws of the government should have a voice in making them, meaning the right to suffrage. CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866). Senator Reverdy Johnson asked whether "person" included females. *Id.* Senator Howard responded that the law of nature, which influenced political affairs, did not regard men and women as equals. *Id.*

⁷⁶ Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1254-55 (2000).

⁷⁷ *Id.* at 1250-54.

⁷⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866). The discussion of the Fourteenth Amendment's impact on marital status laws occurred during the debates surrounding the "Bingham Amendment," an early draft of the Fourteenth Amendment. The Bingham Amendment provided that "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

⁷⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

evidence that the Framers did not wish to disturb marital status laws, Bingham's statement regarding "universal" rights seems to imply that fundamental rights could not be limited by marital status, just as they could not be limited by race.

While the ratification debates shed little light on how women's rights, beyond political rights and married women's property rights, would be impacted by the Fourteenth Amendment, it is important to note that the text of Section 1 did not exclude women from its definition of citizens or from the basic civil rights bestowed upon citizens under the Privileges and Immunities Clause.⁸⁰ In fact, given Section 2's use of the word "male," which worked to deny women the right to vote, it seems unlikely that the Framers, had they wanted to exclude women from the scope of Section 1 and deny women the fundamental rights of citizenship, would have neglected to insert the word "male."⁸¹

B. Judicial Interpretation

The Congressional debates surrounding the adoption of the Fourteenth Amendment unequivocally link its Privileges and Immunities Clause to the Privileges and Immunities Clause of Article IV and to the interpretation of that clause in *Corfield v. Coryell*.⁸² By the time of the ratification debates, scholars and judges had put their "gloss" on the words, so Congress knew what rights privileges and immunities encompassed when they used the phrase again in the Fourteenth Amendment.⁸³

The leading opinion of what privileges and immunities were afforded to citizens under Article IV is *Corfield v. Coryell*.⁸⁴ In *Corfield*, Justice Washington held that the privileges and immunities protected under Article IV included rights "which [were], in their nature, fundamental; which belong[ed], of right,

⁸⁰ Rierison, *supra* note 4, at 106.

⁸¹ *Id.*

⁸² Shankman & Pilon, *supra* note 53, at 8. Under Article IV, "[t]he Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

⁸³ CHESTER J. ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 56 (1997).

⁸⁴ See *supra* note 82 and accompanying text.

to the citizens of all free governments; and which [had], at all times, been enjoyed by the citizens of the several states”⁸⁵ Washington reasoned that providing an exhaustive enumeration of fundamental rights would be “more tedious than difficult.”⁸⁶ However, he did offer general categories of rights such as government protection, enjoyment of life and liberty, and the right to pursue happiness and safety.⁸⁷ Washington’s general headings support the conclusion that the Privileges and Immunities Clause of Article IV is best defined as a guarantee of substantive rights rather than as a generic anti-discrimination clause.⁸⁸ Congress continued to view privileges and immunities through the eyes of Justice Washington during the ratification debates where they consistently referred to the Privileges and Immunities Clause as a source of fundamental rights.⁸⁹

The Supreme Court’s first opportunity to interpret the meaning of the Fourteenth Amendment’s Privileges and Immunities Clause came with its decision in *Slaughter-House*.⁹⁰ Unfortunately, the Court undermined Congress’s intent for the provision when it held that it only encompassed a limited number of rights owing their existence to the federal government, rather than a broad array of fundamental rights.⁹¹

In *Slaughter-House*, Louisiana butchers challenged the State’s enactment of a slaughter-house monopoly.⁹² The butchers argued that the state-sanctioned monopoly, which prohibited the practice of their trade outside the state’s designated facilities, infringed on their right to work and consequently violated the Privileges and Immunities Clause of the Fourteenth Amendment.⁹³ Justice Miller delivered the opinion of the Court and denied the butchers’ claims.⁹⁴ Miller maintained that the Fourteenth Amendment established two categories of citizen-

⁸⁵ 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

⁸⁶ *Id.*

⁸⁷ *Id.* at 551-52.

⁸⁸ Shankman & Pilon, *supra* note 53, at 10.

⁸⁹ *Id.* at 26.

⁹⁰ Newsom, *supra* note 2 at 651.

⁹¹ ANTIEAU, *supra* note 83 at 62.

⁹² *Id.* at 59.

⁹³ *Id.* at 61.

⁹⁴ *Id.* at 80.

ship, United States citizenship and State citizenship.⁹⁵ Each category acted as a status to which certain privileges and immunities were linked.⁹⁶

Miller concluded that the Fourteenth Amendment's privileges and immunities meant something different than those protected under Article IV and enumerated in *Corfield*.⁹⁷ Under Miller's view, the Fourteenth Amendment protected only rights of *national* citizenship.⁹⁸ He placed the fundamental civil rights protected under Article IV in the separate category of state citizenship.⁹⁹ It is important to note, however, that the national rights Miller believed were protected under the Fourteenth Amendment were already protected under the Constitution prior to the Fourteenth Amendment's adoption.¹⁰⁰

In their dissents, Chief Justice Chase, Justices Field, Bradley, and Swaine insisted that the majority's narrow construction of the Privileges and Immunities Clause ignored its fundamental purpose and defeated the Framers' intent.¹⁰¹ Justice Field contended that the privileges and immunities protected under the Fourteenth Amendment were "the natural and inalienable rights which belong to *all* citizens . . ." or fundamental rights.¹⁰² Justice Bradley argued that of the fundamental rights afforded under the Privileges and Immunities Clause, no right was more fundamental than the right to choose one's profession or employment.¹⁰³

⁹⁵ *Id.* at 73.

⁹⁶ *Id.* at 74.

⁹⁷ GOLDSTEIN, *supra* note 4, at 6.

⁹⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78-79 (1873). Miller went on to compile a list of seemingly worthless rights associated with United States citizenship including, the right to use the seaports and the navigable waters of the United States and protection on the high seas. *Id.* at 79.

⁹⁹ See GOLDSTEIN, *supra* note 4, at 6.

¹⁰⁰ *Id.* For example, the right to access seaports and use the navigable waters of the United States is derived from Congress's authority to regulate interstate commerce under the Commerce Clause. *Id.*

¹⁰¹ Newsom, *supra* note 2, at 657.

¹⁰² *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting) (emphasis added).

¹⁰³ *Id.* at 119 (Bradley, J., dissenting). The dissenting justices effectively laid the foundation for the substantive due process doctrine, which protected economic rights under the Due Process Clause and dominated Fourteenth Amendment jurisprudence in the 19th century. Newsom, *supra* note 2, at 665.

Two decades after *Slaughter-House*, the Court questioned another Louisiana law on Fourteenth Amendment grounds. In *Plessy v. Ferguson*, the Court upheld a statute requiring "separate but equal" accommodations on railroads arguing that the separation of races did not abridge the privileges and immunities of black citizens.¹⁰⁴ Applying *Slaughter-House*, the Court stated that while the Fourteenth Amendment was intended to protect the narrowly circumscribed privileges and immunities of United States citizens from hostile state legislation, the Amendment was not intended to enforce social equality.¹⁰⁵

In his dissent, Justice Harlan argued that the Louisiana law violated Section 1 of the Fourteenth Amendment because it interfered with the personal liberty of citizens.¹⁰⁶ He defined personal liberty as the ability to change one's situation without restraint.¹⁰⁷ Therefore, if a white and a black man chose to occupy the same railroad car, it was their right to do so, and no government could prohibit their actions without infringing on their personal liberties.¹⁰⁸ Harlan's dissent implies that the Fourteenth Amendment protects an individual's right to choose his or her social role and prohibits laws that relegate citizens to the role of inferior.¹⁰⁹ Social roles enshrined by law cannot be reconciled with a Constitution that "neither knows nor tolerates classes among citizens."¹¹⁰

¹⁰⁴ 163 U.S. 537, 548 (1896).

¹⁰⁵ *Plessy*, 163 U.S. at 543-44. The Court contended that legislation alone could not eradicate social prejudices or bring about social equality. *Id.* at 551. Instead, social change must be the product of "natural affinities" and "voluntary consent." *Id.* While the Court stated that legislation could not force people together, it upheld a statute that made it impossible for them to do so. Additionally, the Court's position ignored the fact that the Fourteenth Amendment's primary purpose was to bring about social equality by abolishing "Black Codes" and empowering former slaves to define their roles in society outside of the slavery regime. Gans, *supra* note 11, at 933.

¹⁰⁶ *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Gans, *supra* note 11, at 926. *Cf.* *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (Fourteenth Amendment bans "legal discriminations, implying inferiority in civil society").

¹¹⁰ Gans, *supra* note 11, at 926 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

III. THE FOURTEENTH AMENDMENT AS A PROHIBITION AGAINST STATE-ENFORCED SOCIAL ROLES

Under Harlan's reading of the Fourteenth Amendment in *Plessy*, the right to choose one's role in society was the heart of Section 1's protection.¹¹¹ Harlan's view squares nicely with the fundamental purpose of the Fourteenth Amendment and the impetus behind its enactment. The Framers believed that creating a basic set of fundamental rights and protecting them from state interference would, with the help of the Due Process and Equal Protection Clauses, eradicate the Black Codes that worked to force black citizens into their pre-Civil War societal roles.¹¹²

This section seeks to answer the second question posed by Justice Thomas in his *Saenz* dissent.¹¹³ What would Fourteenth Amendment jurisprudence look like had the Court in *Slaughter-House* interpreted the Privileges and Immunities Clause as a guarantee of basic fundamental rights and acknowledged the overriding purpose of the Fourteenth Amendment as a protection against laws that forced citizens into narrowly defined social roles?

The question is analyzed in the context of the *Bradwell* decision. Had the *Slaughter-House* Court interpreted the Privileges and Immunities Clause as a guarantee of substantive rights, the Court could have more easily ruled in favor of Myra Bradwell.¹¹⁴ Instead, the Court's narrow interpretation of the Privileges and Immunities Clause confined Bradwell to the domestic sphere and deprived her of her right to shape her role in society by practicing the profession of her choosing.¹¹⁵ The result clearly contradicts the Fourteenth Amendment's overarching purpose of protecting citizens from laws that forced them to conform to stereotypes about their proper role in society.¹¹⁶

¹¹¹ *Id.*

¹¹² *Id.* at 932.

¹¹³ See *supra* note 9 and accompanying text.

¹¹⁴ See *supra* note 6 and accompanying text.

¹¹⁵ See Gans, *supra* note 11, at 936.

¹¹⁶ *Id.*

The Privileges and Immunities Clause of the Fourteenth Amendment ensures that all citizens possess the same set of baseline fundamental rights, which no government can take away.¹¹⁷ The right to choose one's role in society, free of governmental restraints, is a critical component of citizenship.¹¹⁸ Therefore, a state may not use its power to force individuals into narrowly defined social roles by arbitrarily refusing entrance into a profession without offending the Privileges and Immunities Clause.¹¹⁹

While the Fourteenth Amendment was drafted in response to post-Civil War Black Codes, which worked to force former slaves into their pre-Civil War societal roles, the Amendment's protection was not limited to blacks alone.¹²⁰ The Privileges and Immunities Clause does not require that the government action be the product of racial discrimination.¹²¹ Therefore, the guarantees of the Privileges and Immunities Clause could logically be extended to protect women from subordination in the same way that they were intended to protect blacks from discrimination.¹²²

The Court's holding in *Bradwell* that the right to practice a chosen profession was not a privilege or immunity belonging to United States citizens ignored previous judicial interpretation in *Corfield* and the clearly expressed intent of the Amendment's authors. During the ratification debates, members of Congress, including the Amendment's principal drafter, John Bingham, consistently defined privileges and immunities as fundamental rights.¹²³ Additionally, the dissenting justices in *Slaughter-House* contended that of the fundamental rights guaranteed under the Privileges and Immunities Clause, the right to choose one's profession was categorically fundamental.¹²⁴

¹¹⁷ See Gans, *supra* note 11, at 917.

¹¹⁸ *Id.* at 931.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 939. The *Slaughter-House* Court made the same observation. The Court noted that even though the pervading purpose of the Reconstruction Amendments was to address grievances of former slaves, only the Fifteenth Amendment specifically mentions "color." *Slaughter-House*, 83 U.S. (16 Wall.) at 71-72. Therefore, a fair construction of the Amendments extends their protection to all citizens regardless of color. *Id.* at 72.

¹²¹ See Gans, *supra* note 11, at 917.

¹²² *Id.* at 921.

¹²³ See *supra* notes 71-73.

¹²⁴ See *supra* note 103.

The *Bradwell* Court's application of the narrowly construed Privileges and Immunities Clause and "separate-spheres" mentality trapped women within the domestic sphere. Furthermore, the Court's exclusion of women from the bar forced women to conform to stereotypical notions of their proper role in the same way that Black Codes forced newly freed slaves to conform to the role of subordinate.¹²⁵ Ultimately, the Court's refusal to recognize the right to control one's role in society as a privilege or immunity forced women into the roles of wife and mother and ignored the overriding purpose of the Fourteenth Amendment—the eradication of state-enforced social roles.

A. *Defining a Fundamental Right*

Rights qualifying as fundamental have varied throughout our nation's history.¹²⁶ In *Washington v. Glucksberg*, the Court defined fundamental rights as those "which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"¹²⁷ However, if "fundamental" designation requires a deeply rooted tradition of affording a privilege to a group of citizens, then a woman's right to practice a chosen profession would have failed to meet the Court's standard in 1873.¹²⁸ Therefore, the fundamental status

¹²⁵ See Gans, *supra* note 11, at 932-33. The argument could be made that women, unlike slaves, voluntarily chose their subordinate role when they entered into the marriage contract. Rierison, *supra* note 4, at 103. However, the voluntary nature of the contract is deceptive given that women had limited opportunities to earn a living outside the home. *Id.* Therefore, economic necessity pressured many women to marry even when they did not want a family. *Id.*

¹²⁶ KERMIT L. HALL ET AL., *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 323 (1992). For example, during the *Lochner*-Era, freedom to contract was considered fundamental. *Id.* In the 20th century, personal liberties including the right to marry, procreate, and educate one's child as one chooses were given fundamental status. See generally *Loving v. Virginia* 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). In recent years, the rights to privacy and procreational choice have also garnered the fundamental distinction. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

¹²⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).

¹²⁸ Our Nation has a long history of relegating women to inferior status based on the widely held belief that women were intellectually inferior to males. See *supra* notes 16-17 and accompanying text. As a result, women were denied admission to institutions of higher learning and the right to enter certain professions. Rierison, *supra* note 4, at 103.

of the right to choose one's role in society, free of arbitrary governmental restrictions, rests on the idea that the rights guaranteed under the Privileges and Immunities Clause are not based on tradition alone. Instead, the overarching purpose of the Fourteenth Amendment must be considered. The Amendment worked to confer already existing (i.e. traditional) civil rights upon a class they had previously been denied to.¹²⁹ Therefore, tradition is essential in defining the *content* of rights, but not *possession* of rights among groups of citizens. *All* citizens are guaranteed the same baseline fundamental rights under the Privileges and Immunities Clause. Furthermore, tradition alone is generally not a sufficient justification for denying fundamental constitutional rights.¹³⁰ Notably, tradition-based arguments could not insulate racial discrimination under the Fourteenth Amendment;¹³¹ therefore, tradition could not logically protect sex-based discrimination.

B. Justifying Restrictions on a Fundamental Right

In his *Saenz* dissent, Justice Thomas warned that invoking the Privileges and Immunities Clause without fully considering the constitutional implications could result in a downward step on the proverbial slippery slope. He feared that the Clause—if

The view of women as inferiors stemmed largely from a common law regime that treated women as legal non-entities upon marriage. Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17, 21 (1988).

¹²⁹ See *supra* note 61. In *Slaughter-House*, Justice Bradley noted that privileges and immunities are conferred upon individuals by virtue of their citizenship, even if the individual belongs to a group that had previously been denied those rights. 83 U.S. (16 Wall.) at 119 (Bradley, J., dissenting).

¹³⁰ See *In re Marriage Cases*, 183 P.3d 384, 397 (Cal. 2008) (holding that state laws limiting the right to marry to opposite-sex couples were unconstitutional), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). The court noted several long-standing and widely shared traditions from our legal past including, the prohibition against inter-racial marriage, the relegation of minorities to separate but ostensibly equal public facilities, and the exclusion of women from many occupations and official duties, all of which were once considered constitutional. *In re Marriage Cases*, 183 P.3d at 451.

¹³¹ See *Loving*, 388 U.S. at 12. The *Loving* Court recognized that “[t]he freedom to marry ha[d] long been recognized as one of the vital personal traits essential to the orderly pursuit of happiness by free men.” *Id.* However, the fact that antimiscegenation statutes, which worked to deny that right to interracial couples, also had a long-standing history did not dispose of the case.

not carefully handled—could become “yet another convenient tool for inventing new rights, limited solely by the ‘predilections of those who happen at the time to be Members of [the] Court.’”¹³² In a Nation where the law commonly reflects and enforces social norms and status roles, the fear expressed by Justice Thomas is a legitimate one. If the Privileges and Immunities Clause does, as this paper contends, protect against state-enforced social roles, how far does that protection extend? Could the Clause’s protection be interpreted to extend to a woman’s choice to enter into prostitution—the world’s oldest profession? Would a prohibition against state-enforced social roles protect a citizen’s right to practice polygamy? Do gender-segregated bathrooms amount to an imposition of a narrowly defined social role? These concerns can readily be dismissed by focusing on the underlying purpose of Black Codes and laws precluding women from equal access to professions—subordination.¹³³ The Framer’s sought to eradicate laws that forced citizens to conform to the role of subordinate.¹³⁴ Therefore, the Fourteenth Amendment prohibits only those laws that narrowly define a citizen’s role in society in a way that implicates inferiority.

For example, the state law in *Bradwell* enforced women’s subordinate position in society by excluding them from the legal profession and limiting their opportunities for financial independence.¹³⁵ The Court upheld the law reasoning that it rationally reflected the separate spheres occupied by men and women

¹³² *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting) (citation omitted).

¹³³ Gender discrimination is often a more subtle form of subordination than race discrimination. For example, do laws prescribing maximum hours and minimum wages for women protect them from exploitation in the marketplace or impede their ability to compete against male applicants? Does restricting marriage to opposite-sex couples perpetuate the premise that gay couples are second-class citizens or recognize the importance of contributions of both men and women to families? Do anti-abortion laws deny women the ability to determine the course of their lives or recognize a woman’s crucial role in supporting future generations? It is uncertain how the Court might apply a resurrected Privileges and Immunities Clause to the more difficult questions of gender discrimination facing modern society. However, the law in *Bradwell* excluded women from the legal profession in an attempt to prevent them from entering the workforce, gaining financial independence, and shaking their subordinate role in society. Therefore, the law in *Bradwell* clearly offends the anti-subordination interpretation of the Privileges and Immunities Clause.

¹³⁴ Gans, *supra* note 11, at 927.

¹³⁵ See BREST, *supra* note 41, at 1213.

in society.¹³⁶ Additionally, the Court reasoned that the Framer's could not have intended the Privileges and Immunities Clause to entitle women to practice any profession of their choosing given the existence of marital status laws that impeded married women's contractual capacity.¹³⁷ However, the Court failed to consider the enactment of Married Women's Property Acts, which significantly eroded the justification for denying civil rights to women.¹³⁸ Furthermore, even under the old common law regime, women were permitted to act as agents of third parties with their husband's consent.¹³⁹ When representing clients, lawyers act as agents; therefore, the contractual capacity of married women was sufficient to practice law even under the restrictive common law view of women's rights. Because the common law traditionally allowed married women to act as agents, a state could not legitimately deny women admission to the practice of law based on her status as a married woman. Therefore, it seems clear that the purpose of such laws was to exclude women from a powerful profession, whose benefits had traditionally been reserved for men, and coerce them into the role of subordinate.¹⁴⁰

By prohibiting only those laws that implicate second-class citizenship, the Fourteenth Amendment does not disturb societal norms such as gender-differentiated bathrooms or legalize plural marriages. Gender-differentiated bathrooms do not relegate men or women to an inferior societal role. Furthermore, privacy interests protect gender-differentiated bathrooms.¹⁴¹

While the freedom to choose one's role in society requires respect for the life choices of other citizens, even when the chosen social role "cuts against the grain of what [society perceives is] expected and proper," the Fourteenth Amendment does not protect choices contrary to the general public welfare.¹⁴² There-

¹³⁶ *Bradwell*, 83 U.S. (16 Wall.) at 141. (Bradley, J., concurring).

¹³⁷ *Id.* at 140.

¹³⁸ Reirson, *supra* note 4, at 101.

¹³⁹ JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW § 7 (1839).

¹⁴⁰ See *supra* note 16.

¹⁴¹ BREST, *supra* note 41, at 1198.

¹⁴² See *supra* note 115.

fore, its protection cannot logically be extended to prostitution or polygamy, both institutions rife with social ills.¹⁴³

C. Impact of Privileges & Immunities on Fourteenth Amendment Jurisprudence

Since *Slaughter-House*, the Court has relied on the Due Process and Equal Protection Clauses to carry the substantive burden intended for the Privileges and Immunities Clause.¹⁴⁴ Restoration of the Privileges and Immunities Clause to its original purpose as a guarantee of baseline fundamental rights for all citizens would protect rights not explicitly specified in the Constitution and effectively replace the analytically confused doctrine of substantive due process.¹⁴⁵ Additionally, by including the right to choose one's role in society among the fundamental rights guaranteed under the Clause, the Court could have readily applied the Privileges and Immunities Clause, instead of the Equal Protection Clause, to strike down laws that discriminated against citizens based solely on gender.

We tend to regard *Bradwell* and *Plessy* as cases purely about equality. In fact, following the narrow construction of Privileges and Immunities in *Slaughter-House*, cases dealing with racial and gender-based discrimination were brought under the Equal Protection Clause rather than the Privileges and Immunities Clause.¹⁴⁶ However, had the *Slaughter-House* Court

¹⁴³ Numerous health and legal concerns are linked to prostitution such as, illegal drug use, sexually transmitted disease, and violence. The institution of polygamy is commonly associated with statutory rape, incest, and emotional and physical abuse. Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J. L. 101, 128 (2006). As the Court in *Slaughter-House* pointed out, the Fourteenth Amendment was not intended to interfere with the State's power to protect general public interests. *Slaughter-House*, 83 U.S. (16 Wall.) at 62. Justice Bradley echoed that sentiment in his dissent noting that "[t]he State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society . . ." *Id.* at 110 (Bradley, J., dissenting).

¹⁴⁴ See *supra* note 53.

¹⁴⁵ Newsom, *supra* note 2, at 736. For example, in *Muller v. Oregon*, the Court held that states could regulate women's employment in ways that they could not regulate men's employment under *Lochner*. 208 U.S. 412, 418-19 (1908) (upholding maximum hours regulations for females).

¹⁴⁶ See *supra* note 51.

correctly interpreted the Privileges and Immunities Clause as a guarantee of fundamental rights and considered the purpose of the Fourteenth Amendment as a protection against state-enforced social roles, the Clause could have replaced much of our Equal Protection jurisprudence.¹⁴⁷ An interpretation of the Privileges and Immunities Clause that considers the motivation behind the Fourteenth Amendment's enactment, the definition of "privileges and immunities" spelled out by Justice Washington in *Corfield*, and the explanation of the Clause's guarantees given by its principle drafter, John Bingham, would undoubtedly prohibit laws that forced citizens into narrowly defined social roles. Such laws not only violate traditional notions of equal protection but also impede on the fundamental rights guaranteed under the Privileges and Immunities Clause.¹⁴⁸

CONCLUSION

The Constitution, through the Fourteenth Amendment, condemns state actions that interfere with an individual's right to shape his or her role in society.¹⁴⁹ Therefore, the *Bradwell* decision runs afoul of the Fourteenth Amendment. A holding consistent with the Fourteenth Amendment would have allowed women to choose their own sphere rather than enshrining them within the domestic sphere. Myra Bradwell's attorney, Matthew Carpenter, believed that client taste could dictate the frequency at which female attorneys practiced law, but the state legislature could not.¹⁵⁰ Furthermore, by promoting a woman's role as

¹⁴⁷ For example, in *Reed v. Reed*, the Court struck down a state law on the ground that it arbitrarily discriminated against women and consequently, violated the Equal Protection Clause of the Fourteenth Amendment. 404 U.S. 71, 76 (1971). An interpretation of the Privileges and Immunities Clause as a guarantee of fundamental rights, including the freedom to choose one's role in society without arbitrary governmental restrictions, would more logically support the Court's holding that a law that gave mandatory preference to men as estate administrators violated the Fourteenth Amendment. Similarly, had the Court employed this interpretation of Privileges and Immunities to its earlier decisions, laws requiring "separate but equal" accommodations and excluding blacks and women from jury service would have been held unconstitutional. See *generally* *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Hoyt v. Florida*, 368 U.S. 57 (1961).

¹⁴⁸ See *supra* note 115.

¹⁴⁹ See *supra* note 13.

¹⁵⁰ See *supra* note 42.

homemaker and emphasizing a man's role as breadwinner, the *Bradwell* Court impeded the ability of *both* men and women to pursue opportunities that would enable them to shake social stereotypes.¹⁵¹ Therefore, because the decision in *Bradwell* limited women's choices regarding the work they performed and consequently deprived them of the fundamental right to define their role in the constitutional community, the decision clashed with the Fourteenth Amendment's overarching purpose.¹⁵²

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¹⁵¹ Ginsburg, *supra* note 128, at 21. Consider Joe Hogan's decision to enroll in nursing classes at the Mississippi University for Women. See generally *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). The Court concluded that the exclusion of men from the nursing school "len[t] credibility to the old view that women, not men, should become nurses, and [made] the assumption that nursing [was] a field for women a self-fulfilling prophecy." *Id.* at 730.

¹⁵² See *supra* note 125.

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COMMENT

ALL WOUND UP: UNRAVELING THE APPLICATION OF FRCP 12(B)(1) VERSUS FRCP 56 UNDER THE FEDERAL TORT CLAIMS ACT

INTRODUCTION

There is disagreement among courts concerning how a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction should be treated in a Federal Tort Claims Act¹ (FTCA) suit where the determination of the 12(b)(1) motion requires an investigation into the merits of the underlying claim. When the motion requires transitioning from a pure jurisdictional attack to an attack that reaches the merits of the case, such as determining whether an employee was acting within the scope of employment for FTCA purposes, some courts hold it is proper to convert the motion to one for summary judgment under Rule 56 or to a motion to dismiss for failure to state a cause of action under Rule 12(b)(6).² Other courts disagree and hold that the motion should be decided without a conversion.³ Both the Third and Fourth Circuits have recently noted a split among federal circuit courts concerning the treatment of jurisdictional attacks that are “intertwined” with the merits of an FTCA suit.⁴ A re-

¹ 28 U.S.C. § 1346(b)(1) (2006).

² *Torres-Negrón v. J & N Records, LLC*, 504 F.3d 151, 164 (1st Cir. 2007) (“[T]he district court should first determine whether [the] question implicates the merits of the case. . . . If the jurisdictional facts and merits are intertwined, the court should treat a 12(b)(1) motion as a summary judgment motion and resolve it accordingly.”).

³ *See, e.g., Hamm v. United States*, 483 F.3d 135, 137-38 (2d Cir. 2007) (implicitly announcing that the inquiry into scope of employment for FTCA purposes was not an inquiry that called for the 12(b)(1) motion to be converted to a 12(b)(6) or Rule 56 motion). The court dismissed the complaint for lack of subject matter jurisdiction under 12(b)(1). *Id.* at 140.

⁴ In *CNA v. United States*, the Third Circuit stated:

A split among our sister courts of appeals has emerged on the proper procedure for handling situations in which jurisdiction is intertwined with the mer-

view of case law from several circuit courts of appeals concerning the issue of jurisdiction being intertwined with the merits with respect to other areas of federal law, such as the Family Medical Leave Act (FMLA) and Title VII, lends a notion of guidance to the Supreme Court concerning how to treat this issue with respect to the FTCA. If an element of the jurisdictional inquiry is the same as an element of the underlying claim, the court should convert the 12(b)(1) motion to either a 12(b)(6) motion or a Rule 56 motion for summary judgment.

I. RULE 12(B)(1) OR RULE 56? WHEN JURISDICTIONAL ISSUES ARE INTERTWINED WITH THE MERITS OF A CLAIM

A. *Facial Versus Factual Jurisdictional Inquiries: Deference to Plaintiffs' Allegations*

There are two types of challenges to a court's subject matter jurisdiction: facial challenges and factual challenges. Facial challenges, or attacks, merely require the court to analyze whether the plaintiff has properly alleged a basis for subject matter jurisdiction in the complaint.⁵ In a facial challenge, the

its. In some circuits, whether a Government employee was acting in the scope of his employment for purposes of an FTCA claim must be handled as a question of the merits in order to give plaintiffs the appropriate procedural safeguards See *Montez v. Dep't of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004) ("[W]e follow our general rule in holding that a jurisdictional attack intertwined with the merits of an FTCA claim should be treated like any other intertwined attack, thereby making resolution of the jurisdictional issue on a 12(b)(1) motion improper."); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (vacating and remanding for consideration under Rule 12(b)(1)); see also *Augustine v. United States*, 704 F.2d 1074, 1079 (9th Cir.1983) (treating the administrative claim requirement of § 1346(b)(1) as relating too closely to the merits to be handled under Rule 12(b)(1)). Yet the Second Circuit recently reached the opposite conclusion on how a scope-of-employment dispute should be handled procedurally in the FTCA context. In *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007), it held that "where a waiver of sovereign immunity does not apply, a suit should be dismissed under Fed. R. Civ. P. 12(b)(1) and not Fed. R. Civ. P. 12(b)(6) for failure to state a claim."

535 F.3d 132, 143-44 (3d Cir. 2008) (internal citations altered); see also *Kerns v. United States*, 585 F.3d 187, 194-96 (4th Cir. 2009) (noting the circuit split and holding that Rule 12(b)(1) dismissal is inappropriate in an FTCA scope of employment factual inquiry).

⁵ *Torres-Negrón*, 504 F.3d at 162-63 (citing *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999)).

proffered factual basis is viewed as true by the court for treatment under a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.⁶ Factual attacks, however, occur when a 12(b)(1) motion involves factual questions that pierce the face of a jurisdictional determination on the pleadings.⁷

The “intertwined” problem arises when there is a factual attack on subject matter jurisdiction that implicates the merits of the underlying claim. In a factual attack, the court can and will consider facts outside the pleadings to determine jurisdiction. If any of the elements examined under the factual jurisdictional analysis would also be implicated in the determination of the validity of the underlying cause of action, then the merits are “intertwined” with the jurisdictional inquiry.⁸ When this happens, the court must decide whether or not to convert the 12(b)(1) motion to a 12(b)(6) or Rule 56 motion.⁹ Such a situation arises when courts venture to determine if a person was acting within the scope of his or her employment for FTCA purposes.

Rules 12(b)(6) and 56 provide plaintiffs with procedural safeguards, such as deference to factual pleadings and discovery, respectively, since the defendant is attacking the plaintiff’s underlying cause of action and not merely the court’s jurisdiction. These safeguards are generally unmatched by a factual, as opposed to a facial, challenge to jurisdiction under Rule 12(b)(1).¹⁰ In a facial challenge to jurisdiction under Rule 12(b)(1), the court takes the plaintiff’s factual allegations as true.¹¹ If, however, the court allows a factual attack on jurisdic-

⁶ The *Torres-Negrón* court noted:

The general rule . . . is that a pleading’s allegations of jurisdiction are taken as true unless denied or controverted by the movant. . . . [I]f the movant . . . denies or controverts the pleader’s allegations of jurisdiction, then he is deemed to be challenging the actual existence of subject matter jurisdiction, and the allegations . . . are not controlling.

Id. at 162 n.8 (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1363, at 653-54 (1969)).

⁷ *Id.* at 163.

⁸ *Id.*

⁹ *Id.*

¹⁰ *CNA*, 535 F.3d at 144; *see also Kerns*, 585 F.3d at 192-93.

¹¹ *See supra* note 6 and accompanying text.

tion which implicates the merits of the underlying claim, and thus, is an indirect factual attack on the merits, the plaintiff loses the deference to his factual allegations and at the same time is not allowed his rights to discovery.¹²

To summarize, a facial attack on subject matter jurisdiction does offer some safeguards to the plaintiff in that the court must take as true the factual jurisdictional allegations in the complaint itself.¹³ Alternatively, a factual attack on subject matter jurisdiction allows the trial court to hear and weigh all evidence of jurisdiction without giving any deference to the plaintiff's allegations and without allowing the plaintiff proper discovery.¹⁴ This sort of free reign is never granted to the court under Rule 12(b)(6) or Rule 56. Treating indirect attacks on the merits as 12(b)(1) motions essentially denies a plaintiff the procedural safeguards he or she would have had under Rule 12(b)(6) or Rule 56.

Maintaining indirect attacks on the merits as motions to dismiss for lack of subject matter jurisdiction subjects the plaintiff to wide discretion by the district court. Converting the inquiry to a Rule 56 motion, however, places more restriction on the district court's discretion and grants more protection to the plaintiff, "who in truth is facing a challenge to the validity of his claim."¹⁵ Under a 12(b)(6) motion, the court must view the plaintiff's allegations as true.¹⁶ Under Rule 56, the court is charged with determining that no genuine issue of material fact exists.¹⁷ Under Rule 12(b)(1), the burden is on the plaintiff to prove jurisdiction; thus, if the plaintiff is not going to receive deference for his factual allegations, he should receive the other procedural safeguards granted under a Rule 56 motion for summary judgment. One should keep in mind that jurisdictional issues are decided by the court, whereas factual determinations are generally made by the jury.¹⁸

¹² *Kerns*, 585 F.3d at 193.

¹³ *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981).

¹⁴ *Id.* at 412-13 (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

¹⁵ *Kerns*, 585 F.3d at 193 (quoting *Williamson*, 645 F.2d at 415).

¹⁶ *Williamson*, 645 F.2d at 415-16.

¹⁷ *Id.* at 416.

¹⁸ *Id.* at 413 (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)).

B. When Are the Jurisdictional Issues Intertwined with the Merits of a Claim?

A claim against an employee of the United States Government properly overcomes sovereign immunity under the Federal Tort Claims Act if the employee, among other things, was acting within the scope of his or her employment.¹⁹ Whether a government employee was acting within the scope of employment is a question that could be answered as one of jurisdiction under a 12(b)(1) motion to dismiss or one concerning the merits of an action that must be answered under Rule 12(b)(6) or 56.²⁰

It is not always easy to tell the difference between a jurisdictional claim and one on the merits.²¹ Many times, especially in context of the FTCA, the same facts that are necessary to determine if an employee acted within the scope of employment for jurisdictional purposes are also applicable to the determination of whether that employee breached a duty under state tort law.²² When the jurisdictional inquiries are intertwined with the merits of a claim in the FTCA context, the decision of whether to proceed under Rule 12(b)(1) or Rule 56 presents a problem that courts have not agreed on how to solve. Before there can be an answer for that problem, however, there must be an understanding of when the jurisdictional issues are intertwined with the merits of a claim.

Courts have not come to a consensus on exactly when the merits of a claim are implicated by a jurisdictional inquiry.²³ Some courts look simply at whether or not there are overlapping

¹⁹ Sovereign immunity under the FTCA is waived if a claim is:

[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

FDIC v. Meyer, 510 U.S. 471, 477 (1994) (internal quotation marks omitted) (modification in original).

²⁰ CNA, 535 F.3d at 140.

²¹ *Id.* at 141.

²² *Id.*

²³ *Id.* at 143.

issues of proof.²⁴ Some courts analyze whether there are individual elements of the jurisdictional inquiry that are interrelated with and not distinct from the merits.²⁵ Other courts state that for a jurisdictional inquiry to be intertwined with the merits the two analyses must be completely coextensive.²⁶ In an effort to make the analysis clearer, some courts hold that "[t]he jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case."²⁷ Thus, courts must determine when the jurisdictional inquiries are intertwined with the merits of a claim before deciding whether to proceed under Rule 12(b)(1) or Rule 56.

C. Various Circuit Courts' Views on Converting 12(b)(1) Motions to 12(b)(6) or Rule 56 Motions when Jurisdictional Inquiries are "Intertwined" with the Merits

The various circuit courts of appeals are divided on how to handle the situation when a jurisdictional inquiry under the FTCA implicates the merits of the underlying tort claim. In order to establish subject matter jurisdiction in an FTCA claim, the plaintiff must allege facts sufficient to show that "the government employee was acting within the scope of his or her employment at the time of the accident."²⁸ On its face, the scope of employment inquiry is jurisdictional. Yet, a factual challenge to jurisdiction can implicate an element of the underlying state tort claim in FTCA actions.²⁹ Thus, when the government questions whether one of its employees was acting within the scope

²⁴ *Id.* (citing *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983) ("[D]eterminative jurisdictional facts also go directly to the merits")). The Third Circuit agrees with the first approach—"intertwined with the merits" means there are overlapping issues of proof. *Id.*

²⁵ *Id.* (citing *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)) (analyzing whether the two inquiries were "unrelated").

²⁶ *Id.* (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)) ("The existence of plaintiff's cause of action depends on whether [the defendant] was acting within the course and scope of his employment. The pertinent inquiry will resolve both the question of subject matter jurisdiction and a necessary element of the tort claim.")).

²⁷ *Id.* (citing *Holt v. United States*, 46 F.3d 1000, 1003 n.7 (10th Cir. 1995)).

²⁸ *Kerns*, 585 F.3d at 194.

²⁹ *Id.*

of employment at the time the incident on which the claim is based occurred, the inquiry becomes one concerning the merits of the substantive claim. Under these circumstances, some circuit courts of appeals hold that the district court should grant jurisdiction and proceed under Rule 12(b)(6) or Rule 56 as a direct attack on the merits of the claim. Others hold that the district court should be allowed to proceed under Rule 12(b)(1).

1. The Conversion Team: First, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuit Courts of Appeals

The First Circuit has stated generally, “where . . . the jurisdictional issue and substantive claims are so intertwined the resolution of the jurisdictional question is dependent on factual issues going to the merits, the district court should employ the standard applicable to a motion for summary judgment.”³⁰ In *Torres-Negrón*, the First Circuit noted that when the relevant facts are pertinent to both the 12(b)(1) motion and the merits, the court should dismiss the case on jurisdictional grounds only if the “material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.”³¹ The court is essentially saying if the jurisdictional attack is facial and clearly dispositive, then, and only then, should the court dismiss on jurisdictional grounds. If the jurisdictional facts presented to the court are such that there is a material dispute, then the court should convert the motion to one for summary judgment if necessary.

In *Kerns v. United States*, the Fourth Circuit reversed the United States District Court for the District of Maryland and held that “[b]ecause the scope-of-employment issue is determinative of both jurisdiction and the underlying merits of an FTCA claim, dismissal under Rule 12(b)(1) is inappropriate unless the jurisdictional allegations are clearly immaterial or

³⁰ *Torres-Negrón*, 504 F.3d at 163 (quoting *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005)) (internal quotation marks and citations omitted).

³¹ *Id.* (quoting *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting *Augustine*, 704 F.2d at 1077) (internal quotation marks omitted)).

wholly unsubstantial and frivolous.”³² The Fourth Circuit ruled that when an FTCA jurisdictional inquiry leads the court into facts that are relevant to the merits of the underlying claim, the two become “inextricably intertwined” and the court should “assume jurisdiction and assess the merits of the claim.”³³ The court could not identify any reason why the intertwined issue of jurisdiction and the merits should be treated any differently under the FTCA as opposed to other tort claims.³⁴

The Fifth Circuit favors the notion that when a jurisdictional challenge is also a challenge to the merits of a federal cause of action, the court should deal with the issue as a direct, factual attack on the merits of the underlying claim.³⁵ In *Montez v. Department of the Navy*, the Fifth Circuit held that when an issue of fact is germane to both the jurisdictional inquiry in an FTCA action and the underlying tort claim, a court should find that jurisdiction exists and proceed to deciding the motion “as a direct attack on the merits of the plaintiff’s case” under the regime for Rule 12(b)(6) or Rule 56.³⁶

In an Employee Retirement Income Security Act (ERISA) case, the Sixth Circuit cited the Supreme Court ruling in *Bell v. Hood*, which explained that when the determination of jurisdiction is intertwined with the merits, the courts should assume jurisdiction and decide the case on the merits.³⁷ The Sixth Circuit also quoted the Fifth Circuit, which stated that “subject matter jurisdiction and the merits will normally be considered intertwined where the [same] statute provides both the basis of

³² *Kerns*, 585 F.3d at 195. See also *id.* at 193 (“And when the jurisdictional facts are inextricably intertwined with those central to the merits, the court should resolve the relevant factual disputes only after appropriate discovery, unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous.”).

³³ *Id.* at 195.

³⁴ *Id.*

³⁵ *Williamson v. Tucker*, 645 F.2d 404, 415-16 (5th Cir. 1981) (noting this action is proper if “the plaintiff’s federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous”).

³⁶ *Montez v. Dep’t of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004) (quoting *Williamson*, 645 F.2d at 415). See also *id.* (“Therefore, we follow our general rule in holding that a jurisdictional attack intertwined with the merits of an FTCA claim should be treated like any other intertwined attack, thereby making resolution of the jurisdictional issue on a 12(b)(1) motion improper.”).

³⁷ *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 443-44 (6th Cir. 2006) (citing *Bell v. Hood*, 327 U.S. 678, 681-82 (1946)).

federal court subject matter jurisdiction and the cause of action.”³⁸ The Sixth Circuit agreed with the notion of converting a jurisdictional inquiry into a direct attack on the merits of the underlying claim when the jurisdictional issue implicates an element of that claim.³⁹ According to the Sixth Circuit, such a conversion “provides a ‘greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) . . . or Rule 56 . . . both of which place greater restrictions on the district court’s discretion. . . .”⁴⁰

The Ninth Circuit also agrees that conversion to an attack on the merits is the proper course for an interwoven jurisdictional question.⁴¹ The Ninth Circuit re-iterated the argument made by the majority of courts of appeals: a court reviewing a 12(b)(1) motion implicating the merits of the underlying claim should treat such a motion as one for summary judgment, just as “a resolution of the jurisdictional facts is akin to a decision on the merits.”⁴²

The Eleventh Circuit holds that when there is a factual attack on jurisdiction under a 12(b)(1) motion and the jurisdictional issue is intertwined with the merits, the court should apply the standard for a Rule 56 motion for summary judgment because such a motion is an indirect attack on the merits of the underlying claim.⁴³ The Eleventh Circuit makes an exception to this approach for claims that are frivolous or “made solely for

³⁸ *Id.* (quoting *Clark v. Tarrant County, Tex.*, 798 F.2d 736, 742 (5th Cir. 1986)).

³⁹ *Gentek Bldg. Prods., Inc. v. Steel Peel Litig. Trust*, 491 F.3d 320, 330 (6th Cir. 2007).

⁴⁰ *Id.* (quoting *Williamson*, 645 F.2d at 415-16).

⁴¹ *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ’g Co. v. Gen. Tel. Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979) (“[W]here the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.”).

⁴² *Id.*

⁴³ *Lawrence v. Dunbar*, 919 F.2d 1525, 1530-31 (11th Cir. 1990) (“We simply hold that under the law of this circuit . . . federal claims should not be dismissed on motion for lack of subject matter jurisdiction when that determination is intermeshed with the merits of the claim and when there is a dispute as to a material fact.”).

the purpose of obtaining jurisdiction.”⁴⁴ In *Lawrence*, an FTCA case analyzing whether an employee was in the scope of his employment, elements of both jurisdiction and the underlying claim were implicated, and the Eleventh Circuit held that, because of such “intertwining,” resolution was not proper under Rule 12(b)(1), but only under Rule 56.⁴⁵

2. The Jurisdictional Team: Second, Third, and Seventh Circuit Courts of Appeals

The Third Circuit once noted that when the merits of an FTCA claim are “intertwined” with the jurisdictional facts, the district court should be careful not to reach the merits of the underlying claim while ruling on a 12(b)(1) motion. The court, however, recently acknowledged that its approach, when dealing with the FTCA scope-of-employment issue, is to treat the dispute as jurisdictional.⁴⁶ This jurisdictional treatment is also favored by the Second Circuit.⁴⁷ The Third Circuit acknowledged the concerns of the Fifth, Ninth, and Eleventh Circuits but nonetheless held that it would follow the Second Circuit and the basic approach of treating the conditions for sovereign immunity under the FTCA, 28 U.S.C. § 1346(b)(1), as jurisdictional and not proper for determination under Rule 12(b)(6) or Rule 56.⁴⁸

The Third Circuit stated:

In sum, we adhere to our Court’s practice of applying Rule 12(b)(1) when evaluating whether a plaintiff’s claim has met the six conditions on the FTCA’s waiver of sovereign immunity

⁴⁴ *Id.* at 1530 n.7 (quoting *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 734 (11th Cir. 1982)).

⁴⁵ *Id.* at 1529.

⁴⁶ *CNA v. United States*, 535 F.3d 132, 143-45 (3d Cir. 2008).

⁴⁷ *Id.* (citing *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) (noting the Third Circuit’s agreement with the Second Circuit’s approach in *Makarova v. United States*); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (applying Rule 12(b)(1) to a § 1346(b)(1) claim); see also *Hamm v. United States*, 483 F.3d 135, 137-38 (2d Cir. 2007) (announcing that the inquiry into the FTCA scope-of-employment issue was not an inquiry that called for the 12(b)(1) motion to be converted to a 12(b)(6) or Rule 56 motion and dismissing the complaint for lack of subject matter jurisdiction under 12(b)(1)).

⁴⁸ *CNA*, 535 F.3d at 144-45.

contained in § 1346(b)(1). But we ensure that defendants are not allowed to use Rule 12(b)(1) to resolve the merits too early in litigation. By requiring less of a factual showing than would be required to succeed at trial, district courts ensure that they do not prematurely grant Rule 12(b)(1) motions to dismiss claims in which jurisdiction is intertwined with the merits and could be established, along with the merits, given the benefit of discovery.⁴⁹

The Seventh Circuit disagreed with the aforementioned Conversion Team of courts of appeals. Instead, the Seventh Circuit held that no case should proceed to the merits unless the court is sure it has jurisdiction.⁵⁰ The Seventh Circuit implied that the only occasion for which it would perhaps be proper to convert the 12(b)(1) motion to one for summary judgment would be when the jurisdictional issue is intertwined with the most important issue on the merits.⁵¹

II. THE “INTERTWINING” ISSUE IN OTHER AREAS OF LAW

Perhaps analyzing the jurisdiction-intertwined-with-the-merits issue through the lens of other areas of law will help to shed some light on how the Supreme Court should resolve the current circuit split surrounding the FTCA. Areas of law that will be examined include the Family and Medical Leave Act (FMLA), the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), the Fair Labor Standards Act (FLSA), the Employee Retirement Income Security Act (ERISA), the Americans with Disabilities Act (ADA), and the False Claims Act (FCA).

A. FMLA

In the context of the Family and Medical Leave Act, 29 U.S.C. § 2601, the question of whether a plaintiff is an “eligible employee” under the Act so as to be eligible for benefits is very

⁴⁹ *Id.* at 145.

⁵⁰ *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986) (citing *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 883-84 (Fed. Cir. 1985)).

⁵¹ *Id.* at 929.

similar to the FTCA scope-of-employment question.⁵² Courts have also wrestled with which Rule this inquiry should be analyzed under—Rule 12(b)(1) or Rule 56.⁵³ The Eleventh Circuit reversed the district court in *Morrison* and held that the court should have analyzed the issue under Rule 56, which is far more deferential to the plaintiff.⁵⁴ The *Morrison* opinion held that the district court should only use Rule 12(b)(1) in an FMLA action “[i]f the facts necessary to sustain jurisdiction do not implicate the merits of plaintiff’s cause of action.”⁵⁵

B. ADEA

The Eleventh Circuit also addressed the intertwining issue in context of an Age Discrimination in Employment Act, 29 U.S.C. § 621, claim.⁵⁶ A pertinent jurisdictional question under the ADEA is whether the defendant is an “employer” for purposes of the ADEA.⁵⁷ In deciding the *Garcia* case, the Eleventh Circuit turned to another area of law concerning discrimination whose definition of “employer” was particularly similar to the ADEA’s—Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a.⁵⁸ The Eleventh Circuit noted the split among other circuits regarding challenges to “employer” status and held that such a determination was not “solely jurisdictional” but also implicated the merits of the claim.⁵⁹

⁵² *Morrison v. Amway Corp.*, 323 F.3d 920, 921-22 (11th Cir. 2003).

⁵³ *Id.* at 922.

⁵⁴ *Id.*

⁵⁵ *Id.* at 925. (quoting *Garcia v. Copenhaver, Bell, & Assocs.*, 104 F.3d 1256, 1261 (11th Cir. 1997) (emphasis removed)).

⁵⁶ *Garcia*, 104 F.3d at 1258.

⁵⁷ 29 U.S.C. §§ 621-634 (2006).

⁵⁸ *Morrison*, 323 F.3d at 926-27 (citing *Garcia*, 104 F.3d at 1264) (“Title VII, like the ADEA, makes it unlawful for an ‘employer’ to engage in unlawful discrimination and restricts the definition of ‘employer’ based on the number of employees employed.”).

⁵⁹ The Eleventh Circuit stated the following:

We have surveyed the opinions of other circuits and note a split in authority regarding whether challenges to employer status under federal employment statutes are strictly jurisdictional or intertwined with the merits. *Compare* *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 366 (2d Cir. 2000) (holding Title VII’s fifteen-employee requirement is not jurisdictional), *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 943 (7th Cir. 1999) (few-employees exemption to Title VII, ADA, and ADEA not jurisdictional), *and* *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (Title VII’s fifteen-employee requirement

C. Title VII

The United States Supreme Court has acknowledged that determining whether an issue is purely jurisdictional or also implicates the merits is not always clear.⁶⁰ The Court, in a Title VII case, stated that when Congress does not delineate that a statutory limitation on coverage, such as “employer” status under Title VII, is jurisdictional, “courts should treat the restriction as nonjurisdictional in character.”⁶¹ The Court noted that this was a “bright line” rule and held that that “the threshold number of employees for application of Title VII is an element of a plaintiff’s claim for relief, not a jurisdictional issue.”⁶²

D. FLSA

The sections of the Fair Labor Standards Act, 29 U.S.C. § 201, which make substantive relief available to a plaintiff are also intertwined with the jurisdictional portion of the FLSA.⁶³ Similar to the FMLA “eligible employee” requirement and the ADEA “employer” requirement, the jurisdictional question of “enterprise coverage” under the FLSA is also intertwined with the merits of the underlying claim.⁶⁴ The Eleventh Circuit has followed its own precedent to consistently hold that jurisdictional determinations under these circumstances should be converted to Rule 56 motions.

not jurisdictional), *with* *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) (holding employer status under FMLA goes to jurisdiction, not merits), *and* *Greenlees v. Eidenmuller Enters., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994) (treating employer status under Title VII as jurisdictional). In our view, those courts ruling the issue to be only jurisdictional have been fairly criticized as providing “little or no discussion” to explain their reasoning. *Da Silva*, 229 F.3d at 364. Even if we were inclined to treat the issue as solely jurisdictional, we are bound by our precedent in *Garcia* that holds otherwise.

Id. at 928 n.11.

⁶⁰ *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (citing *Da Silva*, 229 F.3d at 361).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Turcios v. Delicias Hispanas Corp.*, 275 F. App’x 879, 882 (11th Cir. 2008) (unpublished).

⁶⁴ *Id.* See also *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 33 (1st Cir. 2007) (finding that enterprise coverage under the FLSA was not jurisdictional because of the *Arbaugh* decision).

E. ERISA

In an Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1003, claim concerning whether an employee benefit plan actually existed for ERISA purposes, the Ninth Circuit held that jurisdiction under the statute was intertwined with the merits such that conversion to a Rule 56 motion for summary judgment was proper.⁶⁵ Deciding whether an ERISA plan actually exists and whether an ERISA fiduciary duty was breached are factual determinations that are encountered under both a jurisdictional inquiry as well as an analysis of the merits of a plaintiff's claims; thus, the summary judgment standard is proper.⁶⁶

F. ADA

In *Trainor v. Apollo Metal Specialties, Inc.*, the Tenth Circuit held that a dispute over whether the number-of-employees condition was met as to have a claim against an "employer" under the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117, was an intertwined inquiry that should properly be decided under Rule 56.⁶⁷ The Court held that when the parties submit evidence which pierces the pleadings, the motion should be treated as one for summary judgment.⁶⁸

G. FCA

Similarly, where the False Claims Act, 31 U.S.C. § 3730(e)(4), provides a basis for jurisdiction and a cause of action, the proper standard under which to proceed is Rule 56.⁶⁹ Under the FCA, the jurisdictional question of whether a "public disclosure" has occurred in a *qui tam* action must be answered by analyzing the same statute which creates the plaintiff's cause of

⁶⁵ *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997).

⁶⁶ *Id.* at 910.

⁶⁷ 318 F.3d 976, 978 (10th Cir. 2002) (fifteen employee requirement was an element of the ADA cause of action).

⁶⁸ *Id.*

⁶⁹ *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1543 (10th Cir. 1996).

action.⁷⁰ The Tenth Circuit has concluded that such an inquiry must be resolved under Rule 12(b)(6), or by conversion to Rule 56.⁷¹ The Fourth Circuit agreed that an “intertwined” analysis under the FCA question of whether there was “public disclosure” should be under a conversion to Rule 56.⁷²

III. FTCA IN LIGHT OF OTHER AREAS OF LAW - HOW SHOULD THE SUPREME COURT RESOLVE THIS CIRCUIT SPLIT?

The majority of courts of appeals in areas of law outside the FTCA have treated the intertwining issue the same—they convert the motion into one for summary judgment and resolve the claim on the merits. Of the few courts that have addressed this issue within the FTCA context specifically, the Fourth, Fifth, Ninth, and Eleventh Circuits have found that motions involving jurisdictional inquiries which implicate the merits of a claim should be treated as Rule 12(b)(6) or Rule 56 motions. Only the Second and Third Circuits have held otherwise.

The Fifth Circuit noted emphatically that “a jurisdictional attack intertwined with the merits of an FTCA claim should be treated like any other intertwined attack, thereby making resolution of the jurisdictional issue on a 12(b)(1) motion improper.”⁷³ In *Moran v. Kingdom of Saudi Arabia*, the Fifth Circuit ruled that under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, an intertwined attack could be deter-

⁷⁰ *Id.* (citing *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1517-18 (10th Cir. 1996). See also *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1049 n.13(10th Cir. 2004) (“Whether a ‘public disclosure’ has occurred is a jurisdictional inquiry arising out of the same statute that creates the cause of action, precipitating an investigation necessarily intertwined with the merits.”). Thus, the FCA jurisdictional inquiry should be performed under Rule 56 as a motion for summary judgment. *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 173 (5th Cir. 2004) (citation omitted).

⁷¹ *United States ex rel. Fine*, 99 F.3d at 1543.

⁷² *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009).

⁷³ *Montez v. Dep't of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004). Where subject matter jurisdiction is challenged, a district court generally is “free to weigh the evidence and resolve factual disputes” in deciding whether it has authority to hear a case. *Id.* at 149 (citing *Land v. Dollar*, 330 U.S. 731 (1947)). This is not true where issues of fact are central to both subject matter jurisdiction and the merits of the claim. *Id.* at 150. Under these circumstances, the court must assume jurisdiction and deal with the objection under either Rule 12(b)(6) or Rule 56. *Id.*

mined under Rule 12(b)(1) because the immunity being sought under the FSIA is immunity from suit, not immunity from liability, such as under the areas of law mentioned above and the FTCA.⁷⁴ The court in *Montez* noted that actions under the FTCA, where there were no comity concerns, were properly resolved under either a 12(b)(6) or Rule 56 motion.⁷⁵

The Supreme Court has stated:

For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.⁷⁶

The Court in *Bell* noted that just because a valid cause of action does not exist, that does not mean that subject matter jurisdiction is defeated.⁷⁷

The Court also commented on the doctrine of "hypothetical jurisdiction" in *Steel Co. v. Citizens for a Better Environment*.⁷⁸ There, the Court stated that it would not adopt the doctrine, and thus, would not proceed immediately to the merits when there were jurisdictional objections to resolve first; the court noted that without proper jurisdiction, the court should not proceed at all.⁷⁹ In the FTCA scope-of-employment context, however, the jurisdictional objections cannot be resolved without proceeding to the merits, albeit indirectly. The questions surrounding jurisdiction cannot be answered without analyzing the

⁷⁴ 27 F.3d 169, 172-73 (5th Cir. 1994).

⁷⁵ *Montez*, 392 F.3d at 150.

⁷⁶ *Bell v. Hood*, 327 U.S. 678, 682 (1946) (citing *Swafford v. Templeton*, 185 U.S. 487, 493-94 (1902)); *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 305-08 (1923); *Geneve Furniture Mfg. Co. v. S. Karpen & Bros.*, 238 U.S. 254 (1915); *Ill. Cent. R.R. v. Adams*, 180 U.S. 28 (1901).

⁷⁷ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-93 (1998) (citing *Bell*, 327 U.S. at 682).

⁷⁸ *Id.* at 101.

⁷⁹ *Id.*

underlying cause of action. Thus, jurisdiction cannot be proper until the 12(b)(1) motion is converted to a Rule 56 motion and the plaintiff is allowed discovery to substantiate his or her claim.

Therefore, the Supreme Court should follow the majority of courts of appeals and should prohibit a district court from ruling on the merits of a substantive claim under the guise of a jurisdictional inquiry without converting the motion to one for summary judgment under Rule 56. Since “no purpose is served by indirectly arguing the merits in the context of federal jurisdiction[.]”⁸⁰ the Court should hold that district courts shall not rule on a jurisdictional issue that intertwines with and implicates the merits of an underlying cause of action under a 12(b)(1) motion to dismiss.

CONCLUSION

The courts should convert 12(b)(1) motions to dismiss for lack of subject matter jurisdiction into a motion for failure to state a claim under Rule 12(b)(6) or one for summary judgment under Rule 56 when the jurisdictional inquiry implicates the underlying merits of a claim. This approach is proper because it provides more procedural protection to the plaintiff by either taking the plaintiff’s allegations in the pleadings as true under a 12(b)(6) motion, by determining that no genuine issue of material fact exists under a Rule 56 motion, or by granting plaintiffs the opportunity for discovery—an opportunity they would not have under Rule 12(b)(1). Because the plaintiff is essentially undergoing a challenge to the validity of his claim—not merely an inquiry into jurisdiction—he is entitled to these protections. Thus, the courts should treat an intertwined attack under the FTCA for what it is—a challenge to the merits of the underlying claim—and should proceed with the inquiry under Rule 12(b)(6) or Rule 56 instead of Rule 12(b)(1).

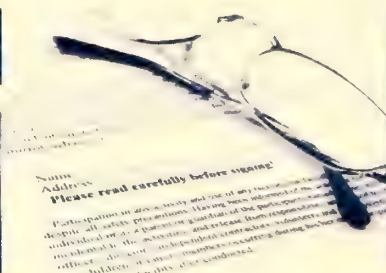
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⁸⁰ *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981).



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“PARTIAL-BIRTH ABORTION” IS NOT ABORTION: *CARHART II*'S FUNDAMENTAL MISAPPLICATION OF *ROE*

*Samuel W. Calhoun**

ABSTRACT

In explaining his constitutional objection to Wisconsin's partial-birth abortion ban, Judge Richard Posner stated:

We . . . do not doubt that if in the course of a normal labor the mother asked her obstetrician to kill the baby in the birth canal and he did so, the state could criminalize this act as infanticide. . . . But [in a partial-birth abortion] . . . there is no issue of infanticide, of killing a live baby that is half-born.[†]

Posner thus contrasts killing during “normal labor” with partial-birth abortion. The former can be constitutionally prohibited, but the latter cannot. Why the distinction? Because to Posner the former involves “killing a live baby that is half-born,” whereas the latter does not.

This Article will show that Judge Posner is correct to assert that killing a baby in the midst of the birth process is not constitutionally protected. The Supreme Court in *Roe v. Wade* strongly implied that the abortion right is not this broad, and Judge Posner instinctively agrees.

But Judge Posner is wrong to say that partial-birth abortion does not kill “a live baby that is half-born.” This Article will demonstrate that the partial-birth procedure in fact does kill a baby during its birth. Ban proponents have therefore been cor-

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† *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998).

rect in their long-standing argument that the partial-birth procedure is not really an abortion. Consequently, *Roe*, properly understood, is inapplicable to partial-birth abortion bans.

Courts, however, including the United States Supreme Court in *Carhart II*, have nonetheless routinely used *Roe/Casey*'s analytical framework to evaluate bans. This common mistake undermines current partial-birth abortion jurisprudence. The rational basis test, not *Roe/Casey*, is the proper evaluative tool. Using the correct standard could have significant consequences for future challenges to the Federal Ban and to the bans of the various states.

INTRODUCTION

The 2007 United States Supreme Court decision in *Gonzales v. Carhart* [*Carhart II*]¹ would seem to end the long fight over partial-birth abortion. Ever since the 1992 disclosure of the details of the partial-birth procedure—which Congress later described as “gruesome and inhumane”²—the majority of Americans, both pro-choice and pro-life, have favored prohibiting it.³ While ban proponents experienced widespread success in enacting partial-birth abortion bans,⁴ almost all were stricken as unconstitutional under *Roe v. Wade*,⁵ as modified by *Planned Pa-*

¹ 550 U.S. 124 (2007). *Carhart II* will hereinafter be used to refer to the *Gonzales* decision, which upheld the Federal Partial-Birth Abortion Ban.

² Congressional Finding 14(L), in notes following 18 U.S.C. § 1531 (Supp. V 2000). This same descriptive phrase was used earlier by the first court to rule on the enforceability of a state partial-birth abortion ban. *Evans v. Kelly*, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997). An earlier decision barred enforcement of an Ohio statute that no doubt was motivated by the partial-birth controversy, but was so drafted that it cannot accurately be called a partial-birth abortion ban. See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1063 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997); James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES IN LAW & MED. 3, 5 n.4 (1998).

³ Gallup polls show that support for bans rose from fifty-seven percent to seventy percent between 1996 and 2003. Kenneth L. Woodward, *What's In A Name? The New York Times on "Partial-Birth" Abortion*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427, 433 n.13 (2005). Polls showed that a majority of self-identified pro-choice respondents also favored bans. *Id.*

⁴ By 2000, at least thirty states had banned the procedure. See *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting). For the history of the Federal Ban, see *infra* note 8.

⁵ 410 U.S. 113 (1973).

renthood of *Southeastern Pennsylvania v. Casey*.⁶ The defining moment was the Supreme Court's 2000 decision in *Stenberg v. Carhart* [*Carhart I*],⁷ which disallowed Nebraska's ban on partial-birth abortion. *Carhart II*, however, upheld a Federal Ban,⁸ thus prohibiting the partial-birth procedure nationwide.⁹ Why, then, isn't it time to move on to other issues in the continuing national controversy over abortion?

Some indeed are shifting their emphasis. Advocacy groups have wondered what *Carhart II* portends for other abortion restrictions.¹⁰ Some scholars have pondered its implications for other legal issues.¹¹ But many still focus upon *Carhart II* itself. While the decision does not lack supporters,¹² its more numerous critics have argued, among other things, (1) that *Carhart II*

⁶ 505 U.S. 833 (1992). *Roe* as modified by *Casey* will hereinafter be referred to as *Roe/Casey*.

⁷ 530 U.S. 914 (2000). *Carhart I* will hereinafter be used to refer to the *Stenberg* decision.

⁸ Federal partial-birth abortion bans were passed "by wide margins" in 1996 and 1997, but both were vetoed by President Clinton. *Id.* at 994 n.11 (Thomas, J., dissenting). The third Congressional ban, signed by President Bush as the Partial Birth Abortion Ban Act of 2003, passed the House by 281-142, Sheryl Gay Stolberg, *Bill Banning Abortion Procedure Advances*, N.Y. TIMES, Oct. 3, 2003, at A24, and the Senate by 64-34. Sheryl Gay Stolberg, *Senate Approves Bill To Prohibit Type of Abortion*, N.Y. TIMES, Oct. 22, 2003, at A1. The law is codified at 18 U.S.C. § 1531 (Supp. V 2000) (hereinafter referred to as the Federal Ban).

⁹ The approved Federal Ban also shows the states how to craft bans to survive constitutional challenge.

¹⁰ See, e.g., Fundraising Letter, Americans United for Life (June 7, 2007) (on file with author) (stating that *Carhart II* "paves the way for states to pass significant new restrictions on abortion").

¹¹ See, e.g., Randy Beck, Gonzales, Casey, and the Viability Rule, 103 NW. U. L. REV. 249 (2009) (arguing that *Carhart II* erodes the significance of viability in abortion jurisprudence); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008) (discussing the decision's impact on substantive due process jurisprudence); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 641 (2008) (citing the decision as evidence of the increasing significance of severability doctrine to Supreme Court jurisprudence); B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007) (arguing that the decision is a step toward reconciling pre-existing different approaches to the right to make medical treatment choices).

¹² See, e.g., Barry A. Bostrom, *Gonzales v. Carhart*, 23 ISSUES L. & MED. 89 (2007); Richard S. Myers, *The Supreme Court and Abortion: The Implications of Gonzales v. Carhart* (2007), in LIFE AND LEARNING XVII (2007) (Proceedings of the Seventeenth University for Life Conference).

is inconsistent with *Carhart I*;¹³ (2) that the Court granted undue deference to the Congressional Findings of Fact underlying the Federal Ban;¹⁴ and (3) that a particular aspect of the Court's rationale—the “regret” factor¹⁵—is not only based on faulty evidence,¹⁶ but also is demeaning to women.¹⁷

Beyond this scholarly output, there is additional evidence that *Carhart II* did not completely resolve the issue of partial-birth abortion bans. The Court explicitly contemplated possible as-applied challenges to the Federal Ban.¹⁸ Moreover, federal appellate decisions subsequent to *Carhart II* already reveal disputes about whether state attempts to prohibit the partial-birth procedure are enough like the Federal Ban to survive constitutional challenge.¹⁹

All of this post-*Carhart II* ferment ignores the most striking aspect of the decision: the Supreme Court committed a fundamental classification error. Despite the procedure's name, par-

¹³ See, e.g., Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 40 n.118 (2007); Martha C. Nussbaum, *Foreward: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 84 (2007) (explaining that *Carhart II*'s reading of *Carhart I* was “bizarrely narrow”).

¹⁴ See, e.g., *The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 185, 265-75 (2007).

¹⁵ In arguing that Congress could reasonably determine that the partial-birth procedure “implicates . . . ethical and moral concerns that justify a special prohibition,” the Court stated that it was “unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained.” *Carhart II*, 550 U.S. at 158-59. Any such regret would be “more anguished and sorrow[ful]” when “a mother . . . learns . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child.” *Id.* at 159-60.

¹⁶ See, e.g., Nussbaum, *supra* note 13, at 86; Ronald Turner, *Gonzales v. Carhart and the Court's “Women's Regret” Rationale*, 43 WAKE FOREST L. REV. 1 *passim* (2008) (implied throughout rather than explicitly stated). *Contra* Teresa Stanton Collett, *Judicial Modesty and Abortion*, 59 S.C. L. REV. 701, 731-32 (2008).

¹⁷ See, e.g., Nussbaum, *supra* note 13, at 85-87; Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 837 (2007).

¹⁸ *Carhart II* involved a facial challenge to the Federal Ban. The Court suggested that an as-applied challenge might be successful under appropriate circumstances. *Carhart II*, 550 U.S. at 167-68.

¹⁹ Virginia's partial-birth infanticide ban was initially invalidated, but then upheld on appeal. See *infra* notes 240-44 and accompanying text. Michigan failed in its attempts to prohibit the procedure by creating a protected legal status for partially delivered fetuses. See *infra* notes 245-48 and accompanying text.

tial-birth abortion is not an "abortion" as that term was understood by the *Roe* Court.²⁰ The Texas statute at issue in *Roe* defined "abortion" as destroying "the life of the fetus or embryo . . . in the woman's womb."²¹ *Roe* is replete with language limiting its application to the duration of a pregnancy—a state's regulatory interests become compelling at some "point during pregnancy";²² a state cannot criminalize abortion "without regard to pregnancy stage";²³ a state can regulate more "as the period of pregnancy lengthens."²⁴ At "live birth," all such constraints on a state's regulatory freedom disappear, as the fetus then becomes a person "in the whole sense."²⁵ The Court thus thought of "abortion" only as an act that terminates a pregnancy at some

²⁰ Since the partial-birth abortion procedure had not been devised at the time of *Roe*, see *infra* note 40 and accompanying text, it is apparent that the *Roe* majority did not actually have it in mind when discussing the concept of abortion. The argument here is that the procedure is also not encompassed by *Roe*'s rationale. Consequently, the term, "partial-birth abortion," is a misnomer. The erroneous name in itself has helped defeat the argument that *Roe* is inapplicable to the procedure. One court, for example, referred to the fact that the legislature in question had defined partial-birth abortion as "*an abortion*" that encompassed certain specified conduct. *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 144 (3d Cir. 2000). Another court emphasized that the ban in question "was intended to be codified under an abortion section—evidencing the state's efforts to restrict abortion access." *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 613 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000). This Article will demonstrate that the word "abortion" following "partial-birth" should not be allowed to mask the reality that the procedure kills a child during its birth. See *infra* note 27 and accompanying text.

²¹ 410 U.S. 113, 117 n.1 (1973). The Texas "abortion" definition also included causing "a premature birth," *id.*, but the Court never focused on this fact. In any event, the act of causing a premature birth would not be covered by the Federal Ban, which requires an "overt act, other than completion of delivery, that kills the partially delivered living fetus." 18 U.S.C. § 1531(b)(1)(B) (Supp. V 2000).

²² 410 U.S. at 163.

²³ *Id.* at 164.

²⁴ *Id.* at 165.

²⁵ *Id.* at 162.

point prior to live birth.²⁶ Consequently, to kill a fetus during its live birth is not an abortion under *Roe*.²⁷

Partial-birth abortion kills a fetus during its live birth.²⁸ “[B]irth’ is the ‘passage of the offspring from the uterus to the outside world.’”²⁹ An intended step of the partial-birth procedure is forcibly to begin pulling a fully formed, living, and intact fetus into the outside world.³⁰ The procedure thus initiates a live

²⁶ In *Webster v. Reproductive Health Services*, the plurality opinion characterized *Roe* as establishing “a constitutional framework for judging state regulation of abortion during the entire term of pregnancy.” 492 U.S. 490, 520 (1989). The framework sought to balance state interests in protecting the fetus “against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying.” *Id.* Once live birth begins, the “term of pregnancy” is essentially over. *Id.* Moreover, the woman is no longer “carrying” the fetus in the conventional sense of that term. *Id.*

²⁷ See *infra* notes 92-141 and accompanying text. Thus the term, “partial-birth abortion,” is an ironic misnomer. The description, “partial-birth,” undoubtedly gives ban proponents a rhetorical edge. So much so, that *Newsweek* Contributing Editor Kenneth Woodward argues that the *New York Times*, because of its well-known support of abortion rights, has studiously avoided using what it regards “as a toxic term.” Woodward, *supra* note 3, at 436-37, 441-42. But whatever rhetorical advantage opponents of the procedure gain by the phrase, “partial-birth,” is offset by the disadvantages of calling the procedure an “abortion.” This label no doubt indirectly, and sometimes directly, see *supra* note 20, supports the erroneous perspective that the partial-birth procedure is an abortion properly subject to *Roe*.

²⁸ The Court in *Carhart II* agrees with this characterization. See *infra* note 91 and accompanying text. “Fetus” is what biologists call an unborn human being beginning at about eight weeks gestational age. LENNART NILSSON & LARS HAMBERGER, A CHILD IS BORN 91 (1990). At this developmental stage, “all the organs are already in place. Everything to be found in a fully grown human being has already been formed.” *Id.* Also, “the growing organism, small as it is, looks human even if quite unlike its parents.” ROBERTS RUGH & LANDRUM B. SHETTLES, FROM CONCEPTION TO BIRTH: THE DRAMA OF LIFE'S BEGINNINGS 39 (1971). “Fetus” thus is the technical term used for an unborn human baby at or beyond a particular gestational age. I will therefore use the terms “fetus” and “baby”/“child” interchangeably. This usage is supported by *Carhart II*, in which the Court speaks most often of the “fetus,” 550 U.S. 124 *passim* (2007), but refers also to “the unborn child,” *id.* at 134, 160, “the infant life,” *id.* at 159, and “the baby.” *Id.* at 138-39. Although using “fetus” and “baby”/“child” synonymously is also consistent with the Latin word, “fetus,” which “simply means ‘offspring’ or ‘unborn young,’” David K. DeWolf, *Book Review/Essay*, 26 GONZ. L. REV. 257, 259 n.10 (1991) (quoting AMERICAN HERITAGE DICTIONARY 260 (1983)), some find it objectionable as revealing “hostility to the right *Roe* and *Casey* secured.” *Carhart II*, 550 U.S. at 186-87 (Ginsburg, J., dissenting).

²⁹ *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting) (quoting DORLANDS ILLUSTRATED MEDICAL DICTIONARY 207 (27th ed. 2000)), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). See also TABER'S CYCLOPEDIA MEDICAL DICTIONARY 251 (20th ed. 2001) (“[t]he act of being born; passage of a child from the uterus”).

³⁰ The steps of the partial-birth procedure were plainly described by Dr. Martin Haskell in a 1992 presentation at a National Abortion Federation meeting. This descrip-

birth process.³¹ Before the fetus has fully emerged—but when either its head or half its lower body is outside the woman's body³²—its skull is collapsed.³³ Because the partial-birth proce-

tion not only played an important role in igniting the partial-birth abortion controversy, see *infra* note 40 and accompanying text, but also has been relied upon in partial-birth abortion decisions as accurately describing the procedure. See, e.g., *Carhart II*, 550 U.S. at 138-39; *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 825-27 (D. Neb. 2004), *aff'd*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, *Carhart II*, 550 U.S. 124 (2007). Haskell spoke of grasping a "lower [fetal] extremity" with "a large grasping forcep" and pulling it "into the vagina." Dr. Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortions*, Presented at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992) (hereinafter "Haskell Presentation"). The surgeon then uses "his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities." *Id.*

The accompanying textual sentence makes four assertions about the state of the fetus during the partial-birth process: (1) fully formed; (2) living; (3) intact; and (4) partially in the outside world. It is incontestable that fetuses subjected to the partial-birth procedure are fully formed. According to Dr. Haskell, the procedure is used "in patients 20-26 weeks in pregnancy." Haskell Presentation, *supra*. "Even at 20 weeks, doctors say, a developing fetus appears remarkably full-formed, right down to the fingerprints." Roy Rivenburg, *Partial Truths*, L.A. TIMES, Apr. 2, 1997 (Life & Style), at 1. This can be corroborated by consulting any book on fetal development. See, e.g., ALEXANDER TSIRAS, FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS (2002). As to whether the fetus is living, in one sense there is no reason for dispute. If the fetus is not living at the time of the partial-birth procedure, the ban does not apply. The Federal Ban is triggered only if "a living fetus" is delivered to a certain point and then killed by an "overt act, other than the completion of delivery." 18 U.S.C. § 1531(b)(1)(A)-(B) (Supp. V 2000). For a discussion of whether the fetus is in fact "alive" during this process, see *infra* note 34 and accompanying text. Regarding intactness, Dr. Haskell describes a two-day process to dilate the cervix prior to the partial-birth procedure. Haskell Presentation, *supra*. This accomplishes sufficient dilation for the fetus's body to be extracted intact, but usually is inadequate to allow the fetus's skull "to pass through." *Id.* See Rivenburg, *supra* (the doctor "pulls out the body except for the head, which is too large to pass without injuring the woman"). For information on the extent to which the doctor brings the fetus outside the woman's body, see *infra* note 32 and accompanying text.

³¹ The Court in *Carhart II* explicitly stated that partial-birth abortion involves "birth"—the procedure's effect is to kill "a fetus . . . just inches before completion of the birth process." 550 U.S. at 157. The Court later found that Congress was reasonable to conclude that the partial-birth procedure "perverts a process during which life is brought into the world." *Id.* at 160.

³² The Federal Ban only applies if "in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." 18 U.S.C. § 1531(b)(1)(A) (Supp. V 2000). Breech presentations [feet first] are the most common. Thus, "[i]n the usual . . . [partial-birth procedure,] the fetus' head lodges in the cervix [see *infra* note 207], and dilation is insufficient to allow it to pass." *Carhart II*, 550 U.S. at 138; see *id.* at 150. For evidence that in this situation the required degree of separation from the mother commonly occurs, see *infra* note 208 and accompanying text.

³³ Professor Cynthia Gorney quotes the following as a "fairly accurate [technical] summation" of the partial-birth procedure:

dures kills a fetus during its live birth,³⁴ it lies outside the constitutional right recognized in *Roe*. Courts have therefore been mistaken to rely upon *Roe* in evaluating legislative bans.

It is important to stress the modesty of the foregoing thesis. I do not argue here that the partially born are constitutional persons under the Fourteenth Amendment.³⁵ Nor do I argue here that the partially born are a class of humanity otherwise intrinsically entitled to legal protection.³⁶ My claim is much more limited—*because the partial-birth procedure is not an abortion, a legislative body, unencumbered by Roe/Casey, can appropriately choose to ban it.*

[T]he abortionist uses forceps to pull a living baby feet-first through the birth canal until the baby's body is exposed, leaving only the head just within the uterus. The abortionist then forces surgical scissors into the base of the baby's skull creating an incision through which he inserts a suction tube to evacuate the brain tissue from the baby's skull. The evacuation of this tissue causes the skull to collapse, allowing the baby's head to be pulled from the birth canal.

Cynthia Gorney, *Gambling With Abortion*, HARPER'S, Nov. 2004, at 34. Gorney does not explain why she finds this description only "fairly" accurate. It certainly comports with Dr. Haskell's explanation of the partial-birth procedure: "[T]he surgeon . . . forces the scissors into the base of the skull . . . [and] spreads [them] to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents." Haskell Presentation, *supra* note 30. Haskell's description, in conjunction with his account of the prior partial delivery of the fetus, *see supra* note 30, makes it clear that the procedure does in fact kill, as Gorney's account portrays and as Congress has found, a "partially-born child." *See* Gorney, *supra*; Congressional Findings 14(H) & (K), in notes following 18 U.S.C. § 1531 (Supp. V 2000).

³⁴ Early in the partial-birth controversy, some ban opponents argued that anesthesia given to the woman kills the fetus before its skull is collapsed. These included nationally syndicated columnist Ellen Goodman. Ellen Goodman, *Pro-life Lawmakers Aren't Looking at All the Pictures*, ROANOKE TIMES, Nov. 14, 1995, at A7. Kate Michelman, then President of the National Abortion Rights Action League, stated that because anesthesia has already killed the fetus, "it is not true that they're born partially. This is a gross distortion, and it's really a disservice to the public to say this." *Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 7 (1996) (transcript of Michelman radio statement). In fact, the early fetal demise argument was the "gross distortion." Anesthesiologists "blasted" it as "scientific bunk." Rivenburg, *supra* note 30 (the article later states that the claim has "been debunked"). *See* Gorney, *supra* note 33, at 41 (characterizing as a "misstep" and "wrong" ban opponents' argument that "the fetus is always dead by the time the doctor begins" the partial-birth procedure).

³⁵ This argument has appeared from time to time during the partial-birth controversy, e.g., Bopp & Cook, *supra* note 2, at 27-28; *infra* note 60, but evaluating it is beyond the scope of this Article.

³⁶ Such an argument might be based, for example, on the "created equal" and "inalienable rights" language of the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Part I will show that the “*Roe* is inapplicable” argument appears throughout the fight to ban the partial-birth procedure. The view was communicated to Congress on multiple occasions by prominent legal authorities. It was also asserted numerous times in ban litigation. To overlook this reality is to miss an important aspect of the partial-birth abortion controversy.

Part II will demonstrate that the constitutional right to abortion choice conferred by *Roe* does not encompass partial-birth abortion. *Roe* strongly implied that it does not apply to killing a baby during its birth. The partial-birth process kills a baby while being born.³⁷ It is therefore wrong to apply *Roe/Casey* to evaluate partial-birth abortion bans. Doing so illegitimately constrains lawmakers' right to prohibit the partial-birth procedure.³⁸

Part III will discuss the consequences of recognizing that partial-birth abortion is not an abortion under *Roe*. Most importantly, the partial-birth procedure is not entitled to the same constitutional protection accorded to abortion. Partial-birth abortion bans should therefore be scrutinized under a rational basis standard, not the criteria applicable to abortion legislation. Applying the appropriate constitutional test could very well have dispositive impact if the Federal Ban is ever subjected to an as-applied challenge.³⁹ Applying the proper standard could also have implications for evaluating state partial-birth abortion legislation in the wake of *Carhart II*.

³⁷ See *infra* note 91 and accompanying text.

³⁸ Some courts that have rejected the “*Roe* is inapplicable” argument have explicitly recognized judges' duty not to substitute their own policy choices for those of the legislature—a law should be overturned only if it is clearly unconstitutional. See, e.g., *Planned Parenthood of Cent. I N.J. v. Farmer*, 220 F.3d 127, 130-31 (3d Cir. 2000); *Little Rock Family Planning Servs. v. Jegley*, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325, at *38 (E.D. Ark. Nov. 13, 1998), *aff'd*, 192 F.3d 794 (8th Cir. 1999). The sincerity of judicial efforts to apply the Constitution correctly in the partial-birth abortion context is not in question. Nonetheless, this Article posits that to the extent that courts have applied *Roe* to evaluate partial-birth abortion bans, they have inappropriately limited the freedom of the people, acting through their elected representatives, to curtail the partial-birth procedure.

³⁹ See *supra* note 18 and accompanying text.

I. HISTORY

Partial-birth abortion burst into the public consciousness in the early to mid-1990s.⁴⁰ Widespread abhorrence quickly led to legislative bans of the procedure.⁴¹ Legal challenges to the bans followed just as swiftly.⁴² Critics had three principal arguments for bans' unconstitutionality⁴³—vagueness,⁴⁴ imposition of an

⁴⁰ According to the Supreme Court, the procedure “gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation.” *Carhart II*, 550 U.S. 124, 138 (2007). See Rivenburg, *supra* note 30 (the debate arose when “[n]ot long after” Haskell “presented . . . [his] how-to paper[,] . . . a copy . . . found its way to the National Right to Life Committee”). Professor Cynthia Gorney gives 1993 as the start of “intense public argument,” the year that “a physician’s published description [undoubtedly Dr. Haskell’s] . . . was reprinted in right-to-life journals.” CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 522 (1998, 2000).

⁴¹ See *supra* notes 4, 8 and accompanying text. The extent of public opposition to the partial-birth procedure is demonstrated not only by the proliferation of bans, but also by some states’ multiple attempts to pass a ban that would survive constitutional scrutiny. One example is Virginia. Its 1998 ban of “partial-birth abortion” was invalidated in *Richmond Medical Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999), *aff’d*, 224 F.3d 337 (4th Cir. 2000). In 2003, Virginia again tried to ban the procedure by criminalizing “partial birth infanticide.” *Richmond Med. Ctr. v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004), *aff’d*, 409 F.3d 619 (4th Cir. 2005). This statute was also invalidated. *Id.* The State successfully sought certiorari from the Supreme Court, which, due to *Carhart II*, vacated the Fourth Circuit decision and remanded the case. *Herring v. Richmond Med. Ctr. for Women*, 550 U.S. 901 (2007). Virginia initially failed in defending its ban, but on appeal was ultimately successful. *Richmond Med. Ctr. For Women v. Herring*, 527 F.3d 128 (4th Cir. 2008), *rev’d on reh’g*, *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009) (en banc). See *infra* notes 240-44 and accompanying text. Michigan’s opposition to the partial-birth procedure perhaps surpasses Virginia’s. For an account of its dogged efforts to enact a prohibition, including a step requiring the direct involvement of the people of Michigan, see *infra* note 245.

⁴² For an early, comprehensive assessment of bans’ constitutionality under the *Roe/Casey* standard, see Ann MacLean Massie, *So-Called “Partial-Birth Abortion” Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301 (1998). Massie mentions the argument that the partial-birth procedure is not an abortion, *id.* at 363, but does not discuss it.

⁴³ In addition to claims of unconstitutionality, ban opponents tried in other ways to quell the widespread outcry against the partial-birth procedure. Some used factual distortions. The most notable example was revealed when Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, admitted “that he lied in earlier statements when he said . . . [that the procedure] is rare and performed primarily to save the lives or fertility of women bearing severely malformed babies.” David Stout, *An Abortion Rights Advocate Says He Lies About Procedure*, N.Y. TIMES, Feb. 26, 1997, at A11. In fact, “[i]n the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus.” *Id.*

⁴⁴ See, e.g., *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 615-19 (E.D. La. 1999), *aff’d on other grounds*, 221 F.3d 811 (5th Cir. 2000); *Planned Parenthood of*

undue burden on a woman's right to obtain a pre-viability abortion;⁴⁵ and lack of a health exception.⁴⁶ Ban proponents contested these three points, but soon introduced a new argument pertinent to the *Roe/Casey*-based attack. They argued that *Roe/Casey* were inapplicable because the proscribed procedure, although labeled as a type of abortion, actually is outside the *Roe* conception of what an abortion entails. The procedure kills a partially born baby, i.e., one in the process of being born. It therefore actually either is or nearly is infanticide.⁴⁷

Determining the precise origin of the "*Roe* is inapplicable" perspective is difficult. Although described in a 1999 federal district court opinion as "a unique new argument in abortion

Greater Iowa, Inc. v. Miller, 30 F. Supp. 2d 1157, 1164-66 (S.D. Iowa 1998), *aff'd* on other grounds, 195 F.3d 386 (8th Cir. 1999); *Evans v. Kelley*, 977 F. Supp. 1283, 1304-11 (E.D. Mich. 1997).

⁴⁵ An undue burden "exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Carhart II*, 550 U.S. at 146 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)). The principal argument that partial-birth abortion bans constitute an undue burden is that they prohibit, in addition to the partial-birth procedure, the more common D&E method of abortion. See *infra* text accompanying notes 152, 197. See, e.g., *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1033-35 (W.D. Ky. 1998), *aff'd*, 224 F.3d 576 (6th Cir. 2000); *Evans*, 977 F. Supp. at 1315-19. The undue burden critique also sometimes is based on the lack of a health exception. See *infra* note 46.

⁴⁶ The health exception argument is premised in the requirement that even post-viability abortion regulations must contain a health exception. See *Carhart I*, 530 U.S. at 929-30. Concerning partial-birth abortion bans, the absence of a health exception has sometimes been relied upon as an independent constitutional deficiency, e.g., *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 613-14 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 30 F. Supp. 2d 1157, 1167-68 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); and sometimes as an element in an undue burden analysis. E.g., *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 501-03 (D.N.J. 1998), *aff'd sub nom. on other grounds*, *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000). The presence of a health exception was a key factor in perhaps the only decision upholding a state partial-birth abortion ban subsequent to *Carhart I*. See *Women's Med. Profl Corp. v. Taft*, 353 F.3d 436, 444-50 (6th Cir. 2003). *Carhart II* held that the lack of a health exception in the Federal Ban was constitutionally permissible. 550 U.S. at 161-66.

⁴⁷ Between 1996 and 1997, the late pro-choice Senator Patrick Moynihan's opinion of the partial-birth procedure changed from the latter to the former. In 1996, he stated that the procedure was "as close to infanticide as anything I have come upon in our judiciary." Barbara Vobejda & David Brown, *Harsh Details Shift Tenor of Abortion Fight; Both Sides Bend Facts On Late-Term Procedure*, WASH. POST, Sept. 17, 1996, at A01. By 1997, based on Ron Fitzsimmons's confession of how he had lied about the procedure [see *supra* note 43], Moynihan had become convinced that the procedure "is infanticide, and one would be too many." See *Meet the Press* (NBC television broadcast Mar. 3, 1997) (transcript on file with the author).

litigation,"⁴⁸ the theory clearly had surfaced by 1998, in court⁴⁹ and elsewhere.⁵⁰ One advocacy group claims that the "Roe is inapplicable" argument originated in its 1997 defense of Arizona's ban.⁵¹ This might well be its first judicial mention,⁵² but the theory clearly predates 1997. The approach was asserted at a 1996 House Subcommittee Hearing by Harvard Law Professor Mary Ann Glendon.⁵³ The earliest mention of the argument I have found is November 1995—by law professors Doug Kmiec⁵⁴ and David Smolin⁵⁵ at a Senate Judiciary Committee Hearing.⁵⁶

Professor Kmiec came to the view that *Roe* does not cover the partial-birth procedure largely through thinking about the

⁴⁸ *Foster*, 43 F. Supp. 2d at 609.

⁴⁹ See, e.g., *Verniero*, 41 F. Supp. 2d at 496-98.

⁵⁰ Examples include a professional journal article, see Bopp & Cook, *supra* note 2, at 25-27, and a failed Washington State ballot initiative to ban partial-birth infanticide. See Jill R. Radloff, Note, *Partial-Birth Infanticide: An Alternative Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555, 1556-57 (1999).

⁵¹ See AFA [American Family Association] Law Center defends Arizona ban with novel argument, AFA JOURNAL, Jan. 1998, at 18.

⁵² See *Planned Parenthood of S. Ariz. v. Woods*, 982 F. Supp. 1369, 1377 (D. Ariz. 1997). In addition to this assertion in a lawsuit, the "Roe is inapplicable" argument was made several times at a March 1997 Congressional Hearing. See *Partial-Birth Abortion: The Truth: Joint Hearing Before the S. Comm. on the Judiciary and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 53, 108 (1997) [hereinafter *March 1997 Hearing*] (Prepared Statement and testimony, respectively, of Douglas Johnson, representing the National Right to Life Committee); *id.* at 72 (testimony of Helen Alvare, representing The Catholic Bishops' Conference); *id.* at 161 (Letter from Prof. Douglas Kmiec to Sen. Orrin G. Hatch & Rep. Henry J. Hyde (Mar. 10, 1997)). The argument was also submitted as part of Congressional floor debate on partial-birth abortion. See *infra* note 75 and accompanying text.

⁵³ *Origins and Scope of Roe v. Wade: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 47 (1996) [hereinafter *April 1996 Hearing*] (Prepared Statement of Professor Mary Ann Glendon). The "Roe is inapplicable" argument was also suggested by Helen Alvare, representing the National Conference of Catholic Bishops, on a television broadcast. *60 Minutes: Partial-Birth Abortion* (CBS television broadcast June 2, 1996) (the procedure "is not truly abortion as the Supreme Court addressed that issue in *Roe v. Wade*").

⁵⁴ *The Partial-Birth Abortion Ban Act of 1995: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 170, 174, 186, 194, 198 (1995) [hereinafter *November 1995 Hearing*] (testimony of Prof. Douglas Kmiec); *id.* at 231 (Letter from Prof. Douglas Kmiec to Sens. Orrin G. Hatch & Patrick Leahy (Nov. 27, 1995)).

⁵⁵ *Id.* at 345-46 (Written Testimony of Prof. David Smolin).

⁵⁶ As was true for Professor Mary Ann Glendon, see *supra* note 53 and accompanying text, other law professors eventually accepted this new argument. See *infra* note 75 and accompanying text.

meaning of the word, "abortion."⁵⁷ His instincts told him that abortion means the termination of a pregnancy, and a search of numerous medical dictionaries confirmed this initial understanding. Thus, an abortion can occur only during an ongoing pregnancy. But doesn't pregnancy end with the beginning of the birth process? How, then, can the partial-birth procedure be an abortion? To Kmiec, the answer depended on what counts as the beginning of birth. Does it mean only a birth begun in the natural way, by God? Or does it also include a birth begun by man's intervention? He determined that, in this secular age, a man-begun process was also a birth, and thus that *Roe* was inapplicable.

Professor Smolin's submission to the November 1995 Hearing is especially interesting because of his interaction with Congress a few months earlier. In June 1995, at the first Congressional Hearing on a proposed federal ban, he submitted a written statement, thus perhaps becoming the first law professor formally to communicate to Congress on the subject.⁵⁸ Smolin stated that "[t]he proposed prohibition of this particular method of abortion constitutes, in constitutional terms, a regulation of abortion."⁵⁹ Five months later, however, he argued that killing a partially extracted infant "has never been held [to be] within the constitutional right or liberty to abort. . . . Thus, the entire constitutional regime created by *Roe* . . . and . . . *Casey* is . . . irrelevant to the constitutional analysis of a ban on partial-birth abortions."⁶⁰

⁵⁷ Telephone Interview with Doug Kmiec, Professor of Law, Pepperdine University School of Law (Aug. 5, 2008) (also the source for the other statements in the text accompanying this footnote). Professor Kmiec was also influenced by the fact that *Roe* explicitly failed to address a Texas statute that criminalized killing a baby in the process of being born. *Id.*; see *infra* notes 103-05 and accompanying text.

⁵⁸ Professor Smolin was scheduled to testify in person, but time constraints made that impossible. *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 104th Cong. 97-102 (1995) [hereinafter *June 1995 Hearing*].

⁵⁹ *Id.* at 98.

⁶⁰ *November 1995 Hearing*, *supra* note 54, at 345. Although Smolin has no specific recollection of why his views changed during this five-month period, Telephone Interview with David Smolin, Professor of Law, Cumberland Law School, Samford University (Aug. 5, 2008), the two statements themselves show how his thinking evolved. In June, Smolin argued that although *Roe* held that the "unborn" are not constitutional persons, a partially born infant might nonetheless have that protected status. *June 1995 Hear-*

Regardless of its exact origin, the “*Roe* is inapplicable” theory has persisted in the battle over partial-birth abortion bans. Since 1999, the argument has on occasion appeared in legislative documents,⁶¹ but has surfaced most often in judicial proceedings. Numerous federal district and circuit court opinions discuss the theory,⁶² and it has been advanced in numerous briefs filed with various courts.⁶³ Although the approach has in part convinced at least one individual judge,⁶⁴ courts have

ing, *supra* note 58, at 100. He relied in part upon the fact that Texas's parturition statute, which criminalized killing a baby while being born, was not challenged in *Roe*. *Id.*; see *infra* notes 103-105 and accompanying text. Smolin did not emphasize the significance of this assertion—his discussion of constitutional personhood appears as an interlude in the middle of an argument that a partial-birth abortion ban can survive scrutiny under a *Roe/Casey* analysis. *June 1995 Hearing, supra* note 58, at 100. By November, Smolin had revised his written statement to highlight the constitutional personhood argument. It now came first, as a separate subsection. *November 1995 Hearing, supra* note 54, at 344-45. Smolin's second argument, missing from his June statement, but again relying on the fact that *Roe* “did not rule on the constitutionality of the Texas statute prohibiting the destruction of an unborn child during childbirth,” was that the partial-birth procedure does not “trigger[] the abortion liberty.” *Id.* at 345. Thus, even if fetuses are not constitutional persons, a partial-birth abortion ban must only satisfy “the rational basis test.” *Id.*

⁶¹ See, e.g., *Partial-Birth Abortion Ban Act of 2002, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 164-65 (2002) (Written Testimony of Douglas Johnson).

⁶² Many partial-birth abortion ban decisions do not mention the theory. *E.g.*, *Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), *aff'd*, 224 F.3d 576 (6th Cir. 2000). Such decisions also have a significant role in any account of the “*Roe* is inapplicable” perspective—as examples of the flaw currently undermining partial-birth abortion jurisprudence.

⁶³ See, e.g., *infra* note 90 and accompanying text.

⁶⁴ Judge Chester Straub “do[es] not believe that a woman's right to terminate her pregnancy under *Roe* . . . extends to the destruction of a child that is substantially outside of her body.” *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 298 (2d Cir. 2006) (Straub, J., dissenting), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). See *id.* at 312. While this acknowledgment would seem to compel the conclusion that *Roe* is inapplicable to the partial-birth procedure, Judge Straub would still apply *Roe*, but in a way that would uphold the Federal Ban. See *id.* at 310-13. A 2003 House Judiciary Committee Report makes the same mistake. The Report first states that “partial-birth abortion should not implicate . . . [the abortion] right because the pregnancy ended once the birth process began and the right to terminate one's pregnancy by aborting one's unborn child does not include an independent right to assure the death of that child regardless of its location to the mother.” H.R. REP. NO. 108-58, at 21-22 (2003). But rather than arguing that *Roe* is thus inapplicable to the partial-birth procedure, the Report says only that “the government [therefore] has a heightened interest in protecting the life of the partially-born child.” *Id.* at 22.

unanimously rejected it.⁶⁵ Some have done so by totally ignoring the argument,⁶⁶ but others have openly scoffed. Courts have characterized the theory as: unsupported by precedent;⁶⁷ “a conceptual theory that . . . has no relationship to fact, law or medicine”;⁶⁸ a “back door effort to limit . . . [the abortion] right”;⁶⁹ ideological;⁷⁰ and “specious.”⁷¹ Third Circuit Judge Maryanne Barry had an extraordinarily negative reaction to the argument. In a span of two pages, she characterized it as (1) “based on se-

⁶⁵ An interesting case study is the history of the “*Roe* is inapplicable” argument in Virginia. The State in 1998 had tried unsuccessfully to ban “partial-birth abortion.” In the ensuing litigation, the State asserted what the district judge called “the rather unusual view that *Roe* . . . [is] inapplicable because . . . the Supreme Court did not announce constitutional protections to abortions where ‘the child is partially born.’” *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 822 (E.D. Va. 1998). The court “decline[d] the State’s invitation to circumvent the requirements of *Roe*,” *id.*, a rejection it reiterated in a later phase of the case. *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 480 (E.D. Va. 1999), *aff’d*, 224 F.3d 337 (4th Cir. 2000) (*per curiam*). In 2003, Virginia tried again to ban the partial-birth procedure, this time making its policy rationale clearer by now seeking to ban “partial birth infanticide.” A different federal district judge invalidated the new statute, once more rejecting Virginia’s attempt “to establish a line [demarking a State’s ability to prohibit abortion] in ‘terms of whether a fetus was in the process of being born.’” *Richmond Med. Ctr. for Women v. Hicks*, 301 F. Supp. 2d 499, 515 (E.D. Va. 2004). The Fourth Circuit affirmed, without explicitly referring to the State’s argument that *Roe* is inapplicable to the partial birth procedure. *See Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005), *vacated & remanded*, 550 U.S. 901 (2007), *aff’d sub nom. Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128 (4th Cir. 2008), *rev’d*, 570 F.3d 165 (4th Cir. 2009). The Fourth Circuit ultimately upheld the Virginia ban based upon *Roe/Casey* as applied in *Carhart II*, with no reference to the “*Roe* is inapplicable” argument. *See Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009).

⁶⁶ A prime example is the Supreme Court in both *Carhart I* and *Carhart II*. *See infra* notes 89-90 and accompanying text.

⁶⁷ *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369, 1377 (D. Ariz. 1997).

⁶⁸ *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 615 (E.D. La. 1999), *aff’d*, 221 F.3d 811 (5th Cir. 2000).

⁶⁹ *Id.* at 619.

⁷⁰ *Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 873 (2008). In affirming the district court’s denial of permissive intervention to Standing Together To Oppose Partial-Birth-Abortion (STTOP), the court characterized STTOP’s brief as taking “an ideological approach to the litigation rather than attempting to argue for the . . . [challenged law’s] validity under relevant Supreme Court precedent.” *Id.* And what was STTOP’s principal argument? That *Roe* does “not address the legal status of . . . transitional person[s],” i.e., human beings in the process of being born. *See* Final Reply Brief of Proposed Intervenor/Appellant, 2006 WL 3223977, at 14.

⁷¹ *R.I. Med. Soc’y v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), *aff’d*, 239 F.3d 104 (1st Cir. 2001).

mantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion instead of [on] logic or medical evidence";⁷² (2) "a desperate attempt to circumvent over twenty-five years of abortion jurisprudence";⁷³ and (3) "an effort to cloud the issues."⁷⁴

This host of derogatory comments suggests that the "*Roe* is inapplicable" argument is frivolous, if not deliberately obfuscating. In fact, courts have been far too dismissive. Part II will demonstrate that sixty-three law professors were correct in stating to Congress that "[t]he destruction of human beings who are partially born is . . . entirely outside the legal framework established in *Roe v. Wade* and *Planned Parenthood v. Casey*."⁷⁵ Courts that have rejected the "*Roe* is inapplicable" argument have inappropriately limited the people's power to express their corporate repudiation of the partial-birth procedure.

II. MISAPPLYING *ROE*

In evaluating whether *Roe/Casey* protect partial-birth abortion, an initial response might be to decry the very idea of constitutional protection for killing a baby during its birth⁷⁶ via what one federal judge has called "a gruesome, brutal, barbaric, and uncivilized medical procedure."⁷⁷ This protest would be un-

⁷² *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 143 (3d Cir. 2000).

⁷³ *Id.* at 144.

⁷⁴ *Id.* Judge Barry also brands as "mischaracterization" a standard, authenticated description of the partial-birth procedure. *See id.* at 140. It thus is ironic that she herself fails to grasp what the procedure actually involves. *See infra* notes 206-09 and accompanying text.

⁷⁵ Letter from sixty-three Law Professors to Sen. Orrin Hatch (May 8, 1997), in 143 CONG. REC. 8807 (1997).

⁷⁶ This characterization of partial-birth abortion is not only justified by what the process in fact entails, *see supra* notes 28-34 and accompanying text and *infra* notes 142-86 and accompanying text, but also has been accepted by the Court in *Carhart II*. *See infra* note 91 and accompanying text. For an eloquent denunciation of the idea of constitutional protection for the partial-birth procedure, *see* *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 180-83 (4th Cir. 2009) (Wilkinson, J., concurring).

⁷⁷ *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004), *aff'd sub nom. Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). Cynthia Gorney writes that "[a] tone of queasy resignation permeates parts of [the district judge's] ruling [invalidating the Federal Ban], as though the judge were still reeling from descriptions of things that appear to be constitutionally protected despite being gruesome and brutal and so forth." Gorney, *supra* note 33, at 45.

derstandable, but misguided. Judge John Noonan has reminded us that the long-protected life of American slavery shows that moral depravity does not necessarily mean the absence of constitutional status.⁷⁸ The proper legal question is whether *Roe*, properly interpreted, encompasses the partial-birth procedure within the constitutional right to an abortion.⁷⁹

The theoretical concept that *Roe* has only a limited reach presumably is not controversial. For example, no one would argue that the decision protects a woman's right to kill any of her children under the age of two. Another example of *Roe*'s limited scope is provided by Born-Alive Infants Protection Acts. These Acts, at both the federal⁸⁰ and state⁸¹ level, are a legislative re-

⁷⁸ See John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668, 668-69 (1984). Slavery was not explicitly mentioned in the Constitution, but its "legitimate presence" in American society was implicitly acknowledged by the "three-fifths clause," the "slave-trade clause," and the "fugitive-slave clause." See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 26-27 (1978).

⁷⁹ *Roe* itself, of course, is highly controversial, but the question of its correctness, i.e., whether the Constitution, properly interpreted, confers a constitutional right to an abortion, is beyond the scope of this Article.

⁸⁰ See *infra* note 85.

⁸¹ Making accurate generalizations about state laws protecting infants born alive following an attempted abortion is complicated. Some such laws are officially named "Born-Alive Infant Protection Acts" and were enacted in the early 2000s more or less contemporaneously with the similarly named Federal Act. See, e.g., 5 ILL. COMP. STAT. ANN. 70/1-36 (Supp. 2008) (modeled after the Federal Act); MICH. COMP. LAWS ANN. § 333.1071.73 (2008) (not modeled after the Federal Act). Some states, however, protected born-alive infants long before the recent flurry of legislation. Pennsylvania, for example, as part of its 1974 Abortion Control Act, punished as second degree murder one who, "with intent to do so, . . . intentionally and wilfully take[s] the life of a premature infant aborted alive." 35 PA. STAT. ANN. § 6604 (1977). In 1978, this statute was repealed with the entire 1974 Act, but was replaced in 1982 by a provision in Pennsylvania's new Abortion Control Act entitled "Infanticide":

The law of this Commonwealth shall not be construed to imply that any human being born alive in the course of or as a result of an abortion or pregnancy termination, no matter what may be that human being's chance of survival, is not a person under the Constitution and laws of this Commonwealth.

18 PA. STAT. ANN. § 3212(a) (2000). For other examples of this early protection for born-alive infants, see MONT. CODE ANN. § 50-20-108(1) (2007) (entitled "Protection of premature infants born alive"); and NEB. REV. STAT. § 28-331 (1995) (entitled "Care and treatment of child aborted").

sponse to live-birth abortions.⁸² Some abortion procedures result in infants born alive.⁸³ Abortionists nonetheless have either directly killed these newborn infants or left them unattended to die.⁸⁴ Born-Alive Infants Protection Acts confer legal personhood status on such babies.⁸⁵ This legislation is unaffected by *Roe/Casey*.⁸⁶

⁸² The legislation, at least to federal lawmakers, was considered essential "to establish . . . a limit to . . . [the] sweeping 'right' to abortion" recognized in *Carhart I*. See Roger Bryon, *Children of a Lesser Law: The Failure of the Born-Alive Infants Protection Act and a Plan for Its Redemption*, 19 REGENT U. L. REV. 275, 278 (2006-07). The Federal Act was also motivated by the decision in *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000), which alarmed lawmakers by stressing a woman's intent in defining "the scope of her right to destroy her offspring." Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). See *infra* note 183.

⁸³ Liz Jeffries & Rick Edmonds, *The Dreaded Complication*, PHIL. INQUIRER (Aug. 2, 1981) (Special Reprint Edition). At the time, the Center for Disease Control estimated "400 to 500 abortion live births" each year in the United States. *Id.* The incidence of live births, of course, depends chiefly on the abortion technique used. A D&E abortion [see *infra* note 152 and accompanying text] is "foolproof," i.e., it "never, ever results in live births." *Id.* Prostaglandin instillation, on the other hand, can produce a live birth rate as high as eight percent. Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births From Late Abortions*, 72 GEO. L.J. 1451, 1458 (1984). Live births following abortions are a continuing phenomenon. See Shantala Vadeyar, Tracey A. Johnston, Mary Sidebotham & Jean Sands, *Neonatal death following termination of pregnancy*, 112 BJOG 1159 (Aug. 2005) (a study of neonatal death following abortion in thirty-one cases over six years in a certain medical region in England).

⁸⁴ Jeffries & Edmonds, *supra* note 83. See Bryon, *supra* note 82, at 275-76 (giving real-life examples of born infants "killed or left to die" following abortion attempts). There sometimes is an attempt to provide medical care to fetuses born alive after an attempted abortion. See MAGDA DENES, IN NECESSITY AND SORROW: LIFE AND DEATH IN AN ABORTION HOSPITAL 39 (1976).

⁸⁵ For example, the Federal Born-Alive Infants Protection Act defines "person," "human being," "child," and "individual" as including "every infant member of the species homo sapiens who is born alive at any stage of development." 1 U.S.C. § 8(a) (2006). "[B]orn alive" includes (but is not limited to) an infant who, following "complete expulsion or extraction" from its mother, "breathes or has a beating heart . . . regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion." *Id.* at § 8(b). Bryon, *supra* note 82, argues that the Federal Act in fact confers very little, if any, actual protection on such infants.

⁸⁶ Although the declaration obviously does not bind a court, Michigan's Born Alive Infant Protection Act states: "A woman's right to terminate pregnancy ends when the pregnancy is terminated. It is not an infringement on a woman's right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion." MICH. COMP. LAWS ANN. § 333.1072(c) (2008). While I have not found a judicial ruling on the constitutionality of Born-Alive Infant Protection Acts, there is substantial legal authority that *Roe* is inapplicable once live birth occurs. The decision most on point is *Showery v. State*, 690 S.W.2d 689 (Tex. Ct. App. 1985), which upheld a murder conviction for a doctor who suffocated a fetus after it was re-

The “*Roe* is inapplicable” argument follows naturally from *Roe*'s acknowledged inapplicability to babies born alive. In the partial-birth procedure, the baby is killed before it is completely separated from the woman, but during a birth process—either the baby's entire head or its trunk from above the navel is entirely outside the woman.⁸⁷ At this stage of partial separation, when the baby clearly is alive, its skull is collapsed.⁸⁸ As will now be demonstrated, *Roe* cannot properly be read to protect the right to kill a baby in this manner.

A. Roe By Its Own Terms Does Not Apply Once the Birth Process Begins

In view of *Carhart I* and *Carhart II*, it would seem the height of presumption to argue that *Roe* does not apply to the partial-birth procedure. The argument was explicitly discussed in the lower court decisions leading to *Carhart I*.⁸⁹ The theory

moved alive from its mother's body following an abortion attempt. The court held that *Roe* was irrelevant because “[s]eparation from the mother is a rite of passage beyond the shadow of conflict with her fundamental rights.” *Id.* at 693-94. *Nealis v. Baird*, 996 P.2d 438 (Okla. 1999) (upholding a wrongful death action for a nonviable fetus born alive), reached a similar conclusion: “Nothing in *Roe* prohibits the states from affording legal protection to fetuses that are born alive.” *Id.* at 454-55. Moreover, Judge Richard Posner has stated that “[o]nce the baby emerges from the mother's body, no possible concern for the mother's life or health justifies killing the baby.” *Hope Clinic v. Ryan*, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, J., dissenting) (involving partial-birth abortion bans), *rev'd*, 249 F.3d 603 (7th Cir. 2001). See *infra* text accompanying note 221. Finally, the history of Pennsylvania's statutory protection for born-alive infants strongly supports the view that *Roe* is inapplicable to such legislation. Both the 1974 and 1982 statutes were part of comprehensive abortion legislation, each entitled “Abortion Control Act.” See *supra* note 81. When both of these Acts were challenged as unconstitutional, the born-alive infant protection provisions were not attacked individually, but only as part of the claim that the Acts as a whole were unconstitutional. When the courts in both cases denied these comprehensive claims, Act opponents did not even argue that the born-alive protective provisions were individually invalid. See *Am. Coll. Obstet. & Gynecol., Pa. Section v. Thornburgh*, 552 F. Supp. 791 (E.D. Pa. 1982) (challenging the 1982 Act), *aff'd*, 476747 (1986); *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975) (challenging the 1974 Act), *aff'd sub nom.* *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (plaintiffs' appeal), *aff'd sub nom.* *Colautti v. Franklin*, 439 U.S. 379 (1979) (defendants' appeal). Thus, even those eager to challenge abortion restrictions acknowledged *Roe*'s inapplicability to measures protecting humans born alive.

⁸⁷ See *supra* note 32 and accompanying text.

⁸⁸ See *supra* note 33 and accompanying text.

⁸⁹ In the initial phase of the lawsuit, the State argued that *Roe* did not recognize “a constitutional right to kill a *partially born human being*.” *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997) (abortionist's request for preliminary injunction). The

was also articulated in briefs submitted to the Court in both cases.⁹⁰ Nonetheless, the Court in both decisions totally ignored the “*Roe* is inapplicable” argument and applied *Roe/Casey* to evaluate partial-birth abortion bans. While the Court's complete disregard of the theory admittedly seems to be its deathblow, this would be an unduly negative assessment. *Carhart II* acknowledges that the partial-birth procedure kills a baby during its birth.⁹¹ All that remains is for the Court to recognize that *Roe* did not extend constitutional protection to a process that kills a baby after its birth has begun.

The *Roe* Court held that the constitutional right of privacy encompasses “the abortion decision,”⁹² i.e., “a woman's decision whether or not to terminate her pregnancy.”⁹³ There plainly is

court interpreted this argument as an “invitation to ignore *Roe*” and declined to accept it because there was “no precedent . . . [that] uses the 'partially born human being' category as a construct for constitutional analysis.” *Id.* The court declined that invitation for a “second time” in ruling favorably on the abortionist's request for a permanent injunction. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1132 n.48 (D. Neb. 1998). The Eighth Circuit expressed no final opinion on whether “there is a separate legal category for the ‘partially born.’” *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999). Even if there were, the category would not be relevant to the present litigation because the court believed “that the word ‘born’ refers most naturally to a viable fetus.” *Id.* This Article demonstrates the deficiencies in this argument. See *infra* notes 159-72 and accompanying text.

⁹⁰ For *Carhart I*, see *Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioners*, 2000 WL 228483, at 2-11. For *Carhart II*, see, e.g., *Brief of Amici Curiae the American Center for Law and Justice, 78 Members of Congress, and the Committee to Protect the Ban on Partial-Birth Abortion in Support of Petitioner*, 2006 WL 1436694, at 9-11.

⁹¹ This conclusion follows undeniably from several statements in the opinion. The fetus is extracted from the womb by methods “conducive to pulling out its entire body, instead of ripping it apart.” *Gonzales v. Carhart*, 550 U.S. 124, at 137 (2007). Doctors thus extract “the fetus intact or largely intact.” *Id.* This extraction method is a “delivery” in that it “assist[s] a woman in childbirth.” *Id.* at 152 (quoting *STEDMAN'S MEDICAL DICTIONARY* 470 (27th ed. 2000)). It thus is properly characterized as a “birth process.” *Id.* at 157; see *id.* at 160. The fetus, regardless of viability, “is a living organism while within the womb,” *id.* at 147—an “unborn child,” *id.* at 160; see *id.* at 134, and an “infant life.” *Id.* at 159. The doctor then kills the fetus after either its head or “trunk past the navel is outside the body of the mother.” *Id.* at 147-48 (quoting 18 U.S.C. § 1531(b)(1)(A) (Supp. IV 2004)). Taken together, these statements acknowledge that the partial-birth procedure kills a baby during its birth. See *id.* at 138-39 (the Court relating a nurse's description of how a doctor stuck “scissors in the back of . . . [a “baby's”] head”) (quoting H.R. REP. NO. 108-58, at 3 (2003)). For a defense of the Court's characterization, see *supra* notes 28-34 and accompanying text and *infra* notes 142-186 and accompanying text.

⁹² *Roe v. Wade*, 410 U.S. 113, 154 (1973).

⁹³ *Id.* at 153. See *supra* notes 20-27 and accompanying text.

no constitutional right to abort once birth occurs. First, once the fetus is born, it enjoys the protection accorded by the Fourteenth Amendment to the life of every "person."⁹⁴ Second, while the Court stated that it would "not resolve the difficult question of when life begins," it was responding to the assertion that "life 'begins at conception and is present throughout pregnancy.'"⁹⁵ The Court therefore was only expressing its unwillingness to "speculate" as to when life begins *during a pregnancy*.⁹⁶ The Court elsewhere stated its belief that at "live birth" both human life⁹⁷ and personhood "in the whole sense"⁹⁸ unquestionably are present.⁹⁹

But what exactly does "live birth" mean? In particular, what is the status of a fetus in the process of being born? *Roe* is not entirely clear on this point, but it contains important indicators. First, in speaking of both constitutional and ontological personhood, the Court stated that these categories do not include "the unborn."¹⁰⁰ As James Bopp and Dr. Curtis Cook have argued, "[a] baby who is partially delivered cannot properly be termed *unborn*."¹⁰¹ In the partial-birth procedure, either the fetus's head or the lower half of its body is outside the woman,¹⁰² i.e., born. Second, the Court quotes, but does not comment upon, a Texas parturition statute, not challenged in the *Roe* litigation, that criminalized killing "a child in a state of being born and before actual birth."¹⁰³ Professor Richard Stith argues that this

⁹⁴ See 410 U.S. at 157-58.

⁹⁵ *Id.* at 159.

⁹⁶ See *id.* But as argued by Judge Michael McConnell, the result in *Roe*, withdrawing legal protection for fetal life, shows that the Court in fact decided the question. Samuel W. Calhoun & Andrea E. Sexton, *Is It Possible to Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers*, 49 WASH. & LEE L. REV. 437, 453 n.79 (1992).

⁹⁷ 410 U.S. at 150, 161.

⁹⁸ *Id.* at 161-62.

⁹⁹ See *supra* notes 80-86 and accompanying text (discussing Born-Alive Infant Protection Acts).

¹⁰⁰ 410 U.S. at 158, 162.

¹⁰¹ Bopp & Cook, *supra* note 2, at 26. Justice Scalia argues that the partial-birth procedure involves "killing a human child—one cannot even accurately say an entirely unborn human child." *Carhart I*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

¹⁰² See *supra* note 32 and accompanying text; see also *infra* notes 206-08 and accompanying text.

¹⁰³ 410 U.S. at 118 n.1.

bare reference shows that the Court “explicitly left undecided” the issue of whether the “momentous shift from sub-human to human life [occurs] at the beginning, in the middle, or at the end of the birth process.”¹⁰⁴ Since, however, the Court denies personhood only to “the unborn,” one can reasonably read its silence about this Texas statute as suggesting “that abortion jurisprudence does not govern state regulation of procedures during extraction of the child.”¹⁰⁵ This conclusion is further supported by an exchange that occurred during the oral arguments in *Roe*:

Mr. Justice Marshall: What does it [the parturition statute] mean?

Mr. Flowers:¹⁰⁶ I would think that --

Justice Stewart: That it is an offense to kill a child in the process of childbirth?

Mr. Flowers: Yes, sir. It would be immediately before childbirth, or right in the proximity of the child being born.

Justice Marshall: **Which is not an abortion.**

¹⁰⁴ Richard Stith, *Location and Life: How Stenberg v. Carhart Undercut Roe v. Wade*, 9 WM. & MARY J. WOMEN & L. 255, 266-67 (2003). Yet Professor Stith himself still argues that to disregard the beginning of the birth process is to act inconsistently with *Roe*'s premise that “[l]ocation—in or out of the womb— . . . determined whether actual human life existed and whether it was constitutionally protected.” *Id.* at 255; *see id.* at 266-67.

¹⁰⁵ Bopp & Cook, *supra* note 2, at 26-27. The United States Court of Appeals for the Third Circuit gave two reasons for rejecting this argument based on the Texas statute. First, “[t]he fact that the Supreme Court did not *sua sponte* review a provision no party asked it to review says nothing about its position on that provision or on [the argument that *Roe* is inapplicable to partial-birth abortions].” *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 144 (3d Cir. 2000). This is a good point, but the court ignores the important exchange in oral argument concerning the statute. *See infra* notes 106-07 and accompanying text. Second, the court considered any arguments based upon the statute as inapplicable to partial-birth abortion because the statute, “[b]y its own terms . . . applies explicitly to killing the fetus . . . during the process of giving birth, not during an abortion procedure.” *Farmer*, 220 F.3d at 144. It will be shown that the partial-birth procedure is an instance of “giving birth.” *See infra* notes 142-86 and accompanying text.

¹⁰⁶ Robert C. Flowers was an Assistant Attorney General of Texas. *Roe*, 410 U.S. at 115.

Mr. Flowers: Which is not--would not be an abortion, yes sir.
You're correct, sir. It would be homicide.¹⁰⁷

Based on this dialogue, it is reasonable to conclude that Justice Marshall, who voted with the majority in *Roe*, did not intend to recognize a constitutional right that would bar states from prohibiting killing a child once delivery has begun.¹⁰⁸ Justice Stewart, also in the *Roe* majority, did not question Justice Marshall's characterization. One can therefore reasonably surmise that he agreed with Justice Marshall's understanding that the right to abortion ends when the birth process begins.

It is noteworthy that *Roe*'s inapplicability to the partial-birth procedure was asserted by numerous law professors during the legislative process leading to the Federal Ban.¹⁰⁹ Those law professors who believed a ban to be unconstitutional had mixed responses. Harvard Professor Laurence Tribe, while never commenting directly on the "*Roe* is inapplicable" theory, demonstrated that he failed to grasp its underlying anatomical facts. Tribe asserts that a ban is irrational because it "defies plausible justification in terms of anything real."¹¹⁰ How so? Because the ban draws a distinction based,

strangely, on the physical location of the fetus between the uterus and the vagina . . . as though the fetus that is being aborted were suddenly to acquire . . . traits of

¹⁰⁷ Transcript of Oral Reargument, *Roe v. Wade*, 410 U.S. 113 (1972) (No. 70-18) (emphasis added), available at http://www.oyez.org/cases/1970-1979/1971/1971_70_18/reargument (last visited Jan. 25, 2010)) My thanks to my former student, Mark Trapp, for bringing this enlightening colloquy to my attention. See Mark M. Trapp, *Blackmun's Bane*, ENTER STAGE RIGHT, Jan. 27, 2003, available at <http://www.enterstageright.com/archive/articles/0103/0103abortion.htm> (last visited Jan. 25, 2010).

¹⁰⁸ I am aware of the grounds for criticizing placing undue emphasis on this exchange concerning a statute that was not under review in *Roe*. See *infra* note 129 and accompanying text.

¹⁰⁹ As mentioned, sixty-three professors endorsed the theory in a 1997 letter to Congress, submitted in conjunction with congressional debate on the proposed ban. See *supra* note 75 and accompanying text. In addition, *Roe*'s limited scope was asserted by several different law professors on multiple occasions during congressional hearings on the ban. See *supra* notes 53-55, 60 and accompanying text.

¹¹⁰ *March 1997 Hearing*, *supra* note 52, at 137 (prepared statement of Prof. Laurence H. Tribe).

personhood, simply by virtue of having been moved from one point to another *within the woman's body* prior to completion of the abortion procedure.¹¹¹

Tribe unaccountably overlooks the crucial fact of the fetus's partial emergence *into the outside world*.¹¹²

In 1996, Georgetown Professor Mark Tushnet was asked directly whether the partial birth procedure, "in which a child is partially delivered before being killed and the delivery is completed[,] is within the scope of the protections afforded by *Roe v. Wade*["¹¹³ Tushnet testified that his "intuition" led him to conclude that *Roe* applied because the Court "drew the line at birth," and it would be difficult to draw it any earlier.¹¹⁴ This is a particularly interesting response given that Tushnet was Justice Marshall's law clerk when *Roe* was reargued and decided. As already shown, the Justice himself had no difficulty in drawing a line earlier than birth—to him, the word "abortion" did not encompass killing a child during the process of childbirth.¹¹⁵

Professor Louis Seidman, another Marshall clerk at the time of *Roe*, would seemingly agree with the distinction drawn by Justice Marshall. Seidman, although arguing in 1995 for a ban's unconstitutionality, came close to admitting the validity of the "*Roe* is inapplicable" theory. Professor Seidman's testimony was preceded by that of Professor Douglas Kmiec, who defended the theory.¹¹⁶ After Senator Fred Thompson repeatedly pressed for Professor Seidman's response to the distinction Kmiec drew between abortions—covered by *Roe/Casey*—and the partial-birth scenario that he asserted fell outside those decisions,¹¹⁷ Seidman said, "I suppose if Congress wants to pass a law that prohibits stabbing a scissors into the head of a baby where eve-

¹¹¹ *Id.* (emphasis added).

¹¹² See *supra* note 32 and accompanying text. Tribe is not the only one to make this mistake. See *infra* notes 206-08 and accompanying text (emphasizing Judge Richard Posner's error).

¹¹³ *April 1996 Hearing, supra* note 53, at 123 (question from Rep. Canady, Member, House Comm. on the Judiciary).

¹¹⁴ *Id.*

¹¹⁵ See *supra* notes 106-07 and accompanying text.

¹¹⁶ *November 1995 Hearing, supra* note 54, at 170, 174, 194, 198.

¹¹⁷ See *id.* at 199-200.

rything is out of the birth canal but a portion of the head, that would be something we could consider.”¹¹⁸

Judge Richard Posner would allow even more extensive protection for the baby. In explaining his constitutional objection to Wisconsin's partial-birth abortion ban, Posner stated:

We . . . do not doubt that if in the course of a normal labor the mother asked her obstetrician to kill the baby in the birth canal and he did so, the state could criminalize this act as infanticide. But here . . . the state has criminalized merely a procedure, and acknowledged the right to abort by an alternative procedure the same fetus whose death by partial birth abortion would subject the doctor to punishment as a murderer. So there is no issue of infanticide, of killing a live baby that is half-born.¹¹⁹

Posner thus flatly proclaims that a state can criminalize killing a baby still wholly within the birth canal,¹²⁰ i.e., none of it is outside the mother.¹²¹ His necessary presupposition is that *Roe* does not extend constitutional protection to such an act.

My principal thesis thus far has been threefold: (1) that the abortion right recognized in *Roe* is delimited by the onset of birth; (2) that the partial-birth procedure entails the beginning of birth; and (3) thus that *Roe* does not constrain legislative bans. It might be argued, however, that my syllogism has a glaring weakness—"birth" as used in *Roe* most probably connoted a full-term delivery. Thus, when Justice Marshall indicated that killing a child during childbirth "is not an abortion," he likely had in mind a full-term fetus emerging from the womb in a routine delivery. Judge Posner obviously had such a fetus in mind

¹¹⁸ *Id.* at 200.

¹¹⁹ *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998) (citation omitted).

¹²⁰ Professor Laurence Tribe presumably would agree: "Nearly everyone, surely, would think it profoundly wrong if 'people with power' chose to treat an admittedly 'unborn' infant, struggling to push itself through the birth canal during the final minutes of its mother's labor, as not yet a person morally entitled to our protection and love." LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 120 (1990).

¹²¹ Posner speaks of a killing within the birth canal, whereas Seidman refers to killing a baby mostly outside the mother. *See supra* text accompanying note 118. It will be shown that Posner's grasp of the anatomy of the partial-birth procedure is erroneous. *See infra* notes 206-09 and accompanying text.

when he referred to a state's ability to criminalize killing a "baby in the birth canal" during "a normal labor."¹²² Consequently, even if one accepts the proposition that *Roe* has a limited scope, the limitation is not nearly broad enough to encompass the typical partial-birth abortion, which occurs far earlier than full-term.¹²³

The foregoing argument can be readily overcome by focusing once more on Justice Marshall's suggestion, via his comment on the Texas parturition statute, that *Roe* does not apply to killing a child during childbirth.¹²⁴ The Texas statute criminalized killing "a child in a state of being born and before actual birth, which child would otherwise have been born alive."¹²⁵ The critical phrase is "would otherwise have been born alive." Does it connote a full-term delivery? The clear answer is "no." At the time of Justice Marshall's comment,¹²⁶ the only proof Texas required was that, "but for the act of the accused,"¹²⁷ the child would have been able to breathe following complete separation from its mother.¹²⁸ The common occurrence of premature births

¹²² See *supra* text accompanying note 119.

¹²³ See *infra* note 134 and accompanying text.

¹²⁴ See *supra* text accompanying notes 106-07.

¹²⁵ *Roe v. Wade*, 410 U.S. 113, 118 n.1 (1973).

¹²⁶ Marshall made his observation on October 11, 1972. See *supra* note 107.

¹²⁷ *Hardin v. State*, 106 S.W. 352, 353 (Tex. Crim. App. 1907).

¹²⁸ This understanding of "born alive" is extrapolated from Texas homicide law. A successful homicide prosecution required proof that the victim was living after complete expulsion from the mother's body. See *Wallace v. State*, 10 Tex. Ct. App. 255, 270 (1881). Showing "aliveness" in turn required a showing that the baby breathed following its complete separation. See *id.* at 271-74. If this test was met, the child was deemed to be "born alive." Thereafter, "however frail it may be, and however near extinction from any cause," a person who intentionally killed it would be guilty of homicide. See *id.* at 275-76. The parturition statute, which covers killings "before actual birth," obviously eliminates any separation requirement. Instead, the question is whether the child, had it not been killed during its birth, would have been able to breathe following its complete separation. The homicide standard of "however frail" shows that in 1972 the parturition statute did not require proof that the baby would have been viable, see *infra* note 131, had it not been killed prior to complete separation, despite what at least one court has stated. *R.I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001). This conclusion is bolstered by the fact that Texas, a few years after the oral argument in *Roe*, enacted a definition of "born alive" that plainly excludes a viability requirement: a child is deemed to be born alive, "irrespective of the duration of pregnancy," as long as it breathes or shows other stipulated "evidence of life" after its "complete expulsion or extraction" from its mother." TEX. FAM. CODE ANN. §12. 05(b) (Vernon 1979) (now codified at TEX. FAM. CODE ANN. § 151.002(b) (Vernon 2001)).

plainly shows that breathing ability precedes full-term development. Consequently, Justice Marshall, in indicating that the act prohibited by the Texas parturition statute was not an "abortion," did not contemplate a "full-term baby" constraint on *Roe's* inapplicability to the birth process.

But isn't it unconvincing to rely so heavily on the specifics of the Texas parturition statute in evaluating Marshall's statement? The statute was not at issue in *Roe*,¹²⁹ and one therefore cannot fairly assume that Marshall's brief comment was made in full awareness of its particulars. In addition, there is an indication that the Texas courts themselves believe that *Roe* impacted the constitutionality of the Texas statute. In *Showery v. Texas*,¹³⁰ the court stated that "[a] prosecution under [the] statute might necessitate an analysis in terms of viability under *Roe*."¹³¹ This statement does not support the "full-term baby" constraint on *Roe's* inapplicability to the birth process, but it does suggest that there might be a viability constraint.¹³² In fact, *Roe's* emphasis on viability is a principal reason that many courts have rejected the "*Roe* is inapplicable" approach. A representative assertion is that "*Roe* . . . categorized fetuses as viable or not viable. No case with which we are familiar uses the 'partially born human being' category as a construct for constitutional analysis."¹³³

If there is a viability limitation on *Roe's* inapplicability to the birth process, the argument that *Roe* does not apply to partial-birth abortion bans is largely defeated, for the partial-birth procedure is mainly used for pre-viable fetuses.¹³⁴ *Roe* itself,

¹²⁹ See *supra* note 105.

¹³⁰ 690 S.W.2d 689 (Tex. Crim. App. 1985).

¹³¹ *Id.* at 692. A fetus is viable when it is "potentially able to live outside the mother's womb, albeit with artificial aid." *Roe v. Wade*, 410 U.S. 113, 160 (1973).

¹³² The court's statement is far from definitive: *Roe* "*might*" be pertinent. Moreover, the *Showery* court's statement was dictum, as the case did not involve a prosecution under the parturition statute.

¹³³ *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997). See, e.g., *R.I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001); *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 497 (D.N.J. 1998), *aff'd sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000).

¹³⁴ See Woodward, *supra* note 3, at 439 (discussing an investigative report by David Brown of the *Washington Post*).

however, refutes a viability constraint. As already noted, the Court denied personhood only to the "unborn," a word that can reasonably be read to exclude any partially delivered baby, regardless of stage of development.¹³⁵ Moreover, to impose a viability constraint is to misperceive the role of viability in *Roe's* analytical framework. Viability marks the point *during a pregnancy* at which the state interest in potential life becomes compelling, therefore justifying prohibition of abortion.¹³⁶ But the beginning of the birth process means that the pregnancy is essentially over.¹³⁷ The "potential life" is now manifest as the baby emerges alive from the woman's body. To acknowledge this reality in no way conflicts with the Court's unwillingness to speculate about when life begins in an ongoing pregnancy.¹³⁸ Viability is thus not a prerequisite for the power to legislate constitutionally about the birth process.

There is a final argument that *Roe* did not intend to encompass non-viable, partially born children within the abortion right. As noted, Judge Posner assumes that a state can constitutionally prohibit as infanticide the killing of a baby during "normal labor."¹³⁹ But he argues that partial-birth abortion bans are unconstitutional because they do not constitute "killing a live baby that is half-born."¹⁴⁰ Posner's characterization of the partial-birth procedure can be evaluated empirically. If the procedure does in fact kill "a live baby that is half-born"—a test that does not mention viability—Posner's logic compels the conclusion that partial-birth abortion bans, just like the infanticide laws he endorses, are not subject to *Roe*. The Supreme Court in *Carhart II* acknowledges that the partial-birth procedure does

¹³⁵ See *supra* notes 100-01 and accompanying text.

¹³⁶ See *Roe*, 410 U.S. at 162-63. However, *Roe* prevents the states from according meaningful protection even to viable fetuses. See *infra* notes 219, 227 and accompanying text.

¹³⁷ At one point, the *Roe* Court refers to viability as an "interim point" preceding "live birth." 410 U.S. at 160. This does not mean that "live birth" can only occur after viability. The Court no doubt was referring to a pregnancy of normal length, in which viability does precede birth. To say that live birth can never precede viability would be to contradict medical reality. See *infra* notes 159-72 and accompanying text.

¹³⁸ See *supra* notes 95-96 and accompanying text.

¹³⁹ See *supra* notes 119-21 and accompanying text.

¹⁴⁰ See *supra* text accompanying note 119.

kill a baby during its birth.¹⁴¹ The next section will demonstrate that the Court is correct. *Roe* therefore does not constrain partial-birth abortion bans.

B. Partial-Birth Abortion Kills a Baby During Its Birth

Does the reference to “birth” in “partial-birth abortion” ring true? Ban opponents have strenuously said “no,” branding the term as disingenuous,¹⁴² propagandistic,¹⁴³ and “inflammatory.”¹⁴⁴ Professor Cynthia Gorney has written that “[t]here is no textbook reference to any . . . medical state called ‘partial birth.’”¹⁴⁵ Even if one assumes she is correct—which is doubtful today given the prominence of the partial-birth abortion controversy—this would not mean there is no actual physical state of being partially born. To my knowledge, there is no word that means “a person in the process of going through a door from the inside of a house to the outdoors.” This does not mean there are no people who are partially outdoors as they emerge from doorways.

The simplest way to resolve this dispute over use of the term, “birth,” is to ask if the phrase “partial birth” describes what actually happens in the partial-birth abortion procedure. It does. As pointed out by Justice Clarence Thomas, “the fetus is all but born when the physician causes its death.”¹⁴⁶ The fetus dies while being born, i.e., being removed from the woman's body.¹⁴⁷ Its life is terminated when it “has already emerged

¹⁴¹ See *supra* note 91 and accompanying text.

¹⁴² Alisa Solomon, *Fetal Distraction: In the Fight over Abortion, Women's Rights Seem to Have Disappeared*, THE VILLAGE VOICE, Jan. 27, 1998, at 49.

¹⁴³ See 60 Minutes: *Partial-Birth Abortion*, *supra* note 53 (comment of Dr. Warren Hern).

¹⁴⁴ *In Depth: Late-Term Abortions* (America's Talking television broadcast June 22, 1995) (comment of Vicki Saporta, Executive Director, National Abortion Federation) (on file with author).

¹⁴⁵ Gorney, *supra* note 33, at 33.

¹⁴⁶ *Carhart I*, 530 U.S. 914, 986 n.5 (2000) (Thomas, J., dissenting). Thomas's “all but born” characterization is clearly correct, given that either the fetus's head or over half its lower body is outside the woman's body before it is killed. See *supra* note 32 and accompanying text.

¹⁴⁷ See *supra* note 29 and accompanying text.

partly into what we would call in layperson's terms the outside world."¹⁴⁸ Hence, it was partially born at the time of its death.¹⁴⁹

As noted, Judge Richard Posner asserts that the partial-birth procedure does not involve "killing a live baby that is half-born."¹⁵⁰ His explanation, however, is curious at best—that a state cannot constitutionally prohibit killing the same fetus "by an alternative procedure."¹⁵¹ Posner here is referring to the fact that partial-birth abortion bans do not apply to standard D&E abortions, in which a fetus is dismembered and removed from the uterus in pieces,¹⁵² rather than being extracted intact, as in the partial-birth procedure. But does Posner's point matter at all in evaluating what actually occurs during the partial-birth procedure? The fetus either is or is not alive and half-born when killed. The fact that it could be killed in some other way is irrelevant.¹⁵³

But there are other possible objections to characterizing the partial-birth procedure as involving an actual partial birth.¹⁵⁴ Admittedly, the initial picture the word "birth" suggests is a full-term, natural birth.¹⁵⁵ That said, few, presumably, would

¹⁴⁸ *November 1995 Hearing*, *supra* note 54, at 150 (statement of Helen Alvare). And "partly" means far more than minimally. *See supra* note 146.

¹⁴⁹ "Partial-birth' as a label emphasizes the fact the delivery of a fetus/baby takes place, but only up to a point . . ." Woodward, *supra* note 3, at 433.

¹⁵⁰ *See supra* text accompanying note 119.

¹⁵¹ *See supra* text accompanying note 119.

¹⁵² *See Carhart II*, 550 U.S. 124, 135-37 (2007).

¹⁵³ Despite the weakness of Posner's argument, one court characterizes it as adequately addressing the concern that striking a partial-birth abortion ban "will condone infanticide." *See Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 498 (D.N.J. 1998), *aff'd sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000). For an extended discussion of the rationality of banning the partial-birth procedure, despite the inability to prohibit standard D&Es, see *infra* notes 193-233 and accompanying text.

¹⁵⁴ For the argument that the Federal Born-Alive Infants Protection Act precludes the concept of "partial birth," see *infra* note 163.

¹⁵⁵ In fact, some have criticized the term "partial-birth" for the very reason that "birth" most naturally connotes a full-term baby. *See Bopp & Cook, supra* note 2, at 22. Some ban opponents have further alleged that ban advocates deliberately cultivated the misimpression that the partial-birth procedure normally involves near-term fetuses, see *March 1997 Hearing, supra* note 52, at 86-90 (statements of Kate Michelman), a charge denied by ban proponents. *See id.* at 87-88 (statements of Helen Alvare and Douglas Johnson). There undeniably were some instances when ban advocates gave incorrect information. *See Vobejda & Brown, supra* note 47 (relating Newt Gingrich's assertion that the procedure is used to abort "child[ren] in the eighth or ninth month"). In fact,

conclude that “partial-birth” is an inapt description because the procedure takes place far earlier than at full-term¹⁵⁶ and depends upon artificial means. Deliveries prior to full-term are habitually called premature births;¹⁵⁷ and deliveries that are induced, assisted by forceps, or occur via Caesarian section all constitute births.¹⁵⁸ But there are two more serious arguments: the partial-birth procedure is not a partial “birth” because (1) it involves a fetus who likely is pre-viable; and (2) it aims for a dead, not a live, baby. Neither of these characteristics negates a partial “birth.”

1. Viability Is Not a Prerequisite for Partial Birth

The United States Court of Appeals for the Eighth Circuit, in addressing the “*Roe* is inapplicable” argument, believed there was no need to determine whether there is a “legal category” for the “partially born,” to which “the rule of *Roe* . . . does not apply.”¹⁵⁹ This step was unnecessary because the record was insufficient to prove that fetuses subject to the partial-birth procedure were partially born—the word ‘born’ refers most naturally to a viable fetus, one that is capable of surviving outside the

the procedure is mainly used for fetuses of “less than 24 weeks gestation.” *Id.* It should be noted, however, that Dr. Martin Haskell stated that he knew of a surgeon who used it “up to 32 weeks or more.” Haskell Presentation, *supra* note 30.

¹⁵⁶ See *supra* note 134 and accompanying text.

¹⁵⁷ James Bopp and Curtis Cook are thus correct in saying that “full-term” and “birth” . . . are two completely different things, both legally and in common parlance.” Bopp & Cook, *supra* note 2, at 22. While premature births are not uncommon, “birth” has also been used to describe some quite unusual deliveries prior to full-term. The CBS Evening News of June 6, 2008 contained an intriguing segment entitled “Born Twice.” It was the story of Macee McCartney, who had prenatal surgery at twenty-five weeks. To perform the procedure, the doctors temporarily pulled the uterus from her mother’s body and then pulled half of Macee’s body outside the uterus. The CBS correspondent spoke of Macee’s “two birth dates,” i.e., the day of her surgery—the first time she was born—and her delivery day ten weeks later. *Evening News* (CBS television broadcast June 6, 2008) (transcript on file with the author). Katie Couric referred to the “baby born not once, but twice.” *Id.*

¹⁵⁸ Macee’s example, *supra* note 157, also shows that “birth” includes non-standard removal from the mother. It is interesting that CBS used “birth,” not partial birth, to describe Macee’s half-delivered state.

¹⁵⁹ *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999), *aff’d*, 530 U.S. 914 (2000).

mother,” whereas the case seemed “to be exclusively about non-viable fetuses.”¹⁶⁰

Assuming that “born” does “most naturally” refer to a viable fetus,¹⁶¹ does non-viability mean there can be no partial birth? In answering this question, it is instructive first to consider viability's pertinence to full-birth status. The National Right to Life Committee's Douglas Johnson gives this view:

The fetus's *location* is what matters . . . if it's all the way out of the woman's body and it's alive, it's been born, no matter how developed it is “Let's say you have a baby born at twenty-two and three-quarters weeks,” . . . [and] “[y]ou have two neonatologists standing over the incubator, arguing about whether they should do this or that, whether it's futile, whether this baby has a chance. Suddenly somebody rushes in from the corridor and strikes the baby on the head with a hammer. Does anybody dispute that a homicide just occurred? No. One neonatologist may say a certain intervention is futile here. Another may say, 'No, we should do this or that thing.' But they're both going to grab that guy and call the cops.”¹⁶²

Johnson's argument rings true. Viability is clearly irrelevant to birth status for fetuses killed after complete separation from the woman. This is now a legal reality under federal law, even if the separation occurred during an abortion procedure. Under the Federal Born-Alive Infants Protection Act, fully separated infants can fit the definition of “born alive,”¹⁶³ regardless

¹⁶⁰ *Id.* See R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 304 (D.R.I. 1999) (suggesting that non-viability in itself precludes a birth process), *aff'd*, 239 F.3d 104 (1st Cir. 2001). This Article's earlier discussion of viability evaluated and rejected the argument that *Roe*'s implied inapplicability to the birth process encompassed only viable fetuses. See *supra* notes 130-38 and accompanying text. The present discussion of viability evaluates the empirical question of whether the concept of “partial birth” includes only viable fetuses.

¹⁶¹ See *supra* text accompanying note 155.

¹⁶² Gorney, *supra* note 33, at 44. In this hypothetical, the baby's gestational age when born suggests its possible viability. It is unclear whether Johnson would state the same outcome if the baby were clearly non-viable. Regardless, other legal developments demonstrate that lack of viability should be irrelevant to a fully separated baby's entitlement to legal protection. See *infra* notes 163-68 and accompanying text.

¹⁶³ See *supra* note 85. One court has used this complete separation requirement to suggest that partially separated infants cannot be “born alive.” See Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 288 (2d Cir. 2006), *vacated*, 224 F. App'x 88 (2d Cir. 2007). The court's argument reflects a complete misreading of the statute. The Federal Act

of their stage of development.¹⁶⁴ Viability has also been found to be irrelevant in other contexts. Some states issue birth certificates for babies born alive regardless of viability.¹⁶⁵ Most states allow actions for nonfatal prenatal injuries regardless of when during pregnancy they were inflicted.¹⁶⁶ Viability is also not a requirement for wrongful death actions brought in connection with babies who died after being born alive.¹⁶⁷ Criminal convictions have also been upheld for causing the death of a live-born baby, regardless of viability¹⁶⁸

includes only fully separated infants within its statutory definition of "born alive," but also says that it shall not "be construed to . . . deny . . . or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive.'" 1 U.S.C. § 8(c) (2006). The law thus "affirms the existence and dignity of postnatal life without denying the same of prenatal life." Stith, *supra* note 104, at 275. See Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 312 (2d Cir. 2006) (Straub, J., dissenting), *vacated*, 224 F. App'x. 88 (2d Cir. 2007).

¹⁶⁴ See *supra* note 85. Viability is also irrelevant under most State Born-Alive Infant Protection Acts. See, e.g., 5 ILL. COMP. STAT. 70/1.36 (Supp. 2008); MICH. COMP. LAWS § 333.1071(2)(b) (2008). Some states require viability, e.g., MONT. CODE ANN. § 50-20-108(1) (2007) (the statute is not named a "Born-Alive Infant Protection Act," but instead is entitled "Protection of premature infants born alive"), but this is a minority view. See H.R. REP. NO. 107-186, at 7, 13 (2001) (stating that thirty States follow a definition of "live birth" that does not contain a viability prerequisite and applies in a failed abortion context).

¹⁶⁵ E.g., FLA. STAT. §§ 382.002(10), 382.013 (2007); 410 ILL. COMP. STAT. 535/1(5), 535/12(1) (2005). The authors of a 2005 British study, which examined the incidence of completely expelled or extracted living fetuses following abortion attempts, presumably would question this practice. The study documents eighteen examples of pre-viable fetuses that met the criteria of "live birth" according to the World Health Organization definition. Vadeyar et. al., *supra* note 83, at 1159-60. The authors said, "it is clear that there is significant underreporting." *Id.* at 1161. The law required that "all live births and neonatal deaths must be registered." *Id.* at 1159-60. Nonetheless, the authors questioned "what purpose it serves to register as a live birth a fetus that is clearly not capable of being born alive and surviving . . . because the gestational age is below the clinical limit of viability. This . . . misleadingly increases the perinatal mortality rate." *Id.* at 1161. It is difficult to imagine a more striking example of an effort to mask the reality of live birth.

¹⁶⁶ Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 47-49 (1993).

¹⁶⁷ *Nealis v. Baird*, 996 P.2d 438, 455 (Okla. 1999) ("*Reason dictates that a child, once born alive, must be recognized as a person regardless of its ability to sustain life for any particular period of time thereafter.*"); *Hudak v. Georgy*, 634 A.2d 600, 603 (Pa. 1993) ("[T]oday we are reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person."). The *Hudak* court states that "no jurisdiction . . . [requires] that a child must be viable at the time of [live] birth in order to maintain an action in wrongful death." *Id.* at 602.

¹⁶⁸ See *Showery v. State*, 690 S.W.2d 689 (Tex. App. 1985) (upholding the murder conviction of a doctor who suffocated a fetus after it was removed alive from its mother's

Stage of development should also be irrelevant to partial-birth status for partially delivered fetuses. Non-viability does not mean that a partially extracted fetus has not been partially born. The key inquiry is not viability, but whether the fetus is alive.¹⁶⁹ The Supreme Court in *Carhart II* stated that viability is irrelevant to whether a fetus is alive within the womb: “[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”¹⁷⁰ Viability is also irrelevant to whether fetuses are alive when doctors begin to drag them from the womb during the partial-birth process. As previously shown, the

body following an abortion attempt). *But cf.* *People v. Chavez*, 176 P.2d 92, 94-95 (Cal. Dist. Ct. App. 1947) (stating that a showing of viability is required, but, in finding the evidence sufficient to prove that the “child was born alive and became a human being,” only mentions “that the baby was born alive and that it breathed and had heart action”). In the non-abortion context, there is also increasing legal recognition of the irrelevance of viability. The Federal Unborn Victims of Violence Act (Laci and Conner’s Law) “provides that if a child in utero is injured or killed during the commission of certain federal crimes of violence against its mother, then the assailant has committed an offense against two victims: the mother *and* the unborn child.” Luke M. Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process*, 87 B.U. L. REV. 1177, 1183 (2007) (describing 18 U.S.C. § 1841 (Supp. V 2005)). The Act applies regardless of the unborn child’s stage of development. *Id.* at 1183 n.19. Thirty-six states have also “incorporated the double-victim approach into their penal codes[.]” *id.* at 1184, and twenty-four of these “provide that unborn children become legally separate entities upon their conception.” *Id.* at 1185 & n.25.

¹⁶⁹ Because the Federal Ban applies even to non-viable fetuses, one court severely criticized Congress for its “misleading and inaccurate language” suggesting that the partial-birth procedure kills a baby during its birth. *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1029-30 (N.D. Cal. 2004), *aff’d sub nom.* *Planned Parenthood Fed’n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *rev’d*, *Gonzales v. Carhart II*, 550 U.S. 124 (2007). To the court, “a ‘live’ fetus is not the same as a ‘viable’ fetus.” *Id.* at 1030. No one can dispute this point. But it is also indisputable that a non-viable fetus can still be alive. “While a fetus typically is not viable until at least 24 weeks lmp [last menstrual period], it can be ‘living’ . . . as early as seven weeks lmp, well before the end of even the first trimester.” *Planned Parenthood Fed’n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1183-84 (9th Cir. 2006), *rev’d*, *Gonzales v. Carhart II*, 550 U.S. 124 (2007). Why then is it inaccurate to refer to a living, non-viable fetus, largely outside the woman’s body, as partially born?

¹⁷⁰ *Carhart II*, 550 U.S. at 147. In upholding South Dakota’s informed consent-to-abortion statute, the Eighth Circuit endorsed the “truthfulness” of a required disclosure describing the fetus as “a whole, separate, unique, living human being,” with “human being” defined as “an individual living member of the species of *Homo sapiens*.” *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735-36 (8th Cir. 2008). As stated by Professor Randy Beck, “[n]o one can reasonably doubt that a developing fetus constitutes a living biological organism distinct from its mother long before the point of viability.” Beck, *supra* note 11, at 274.

evidence plainly establishes that these fetuses are living up until the time their skulls are collapsed.¹⁷¹ Since they are “all but” outside the woman when this occurs,¹⁷² they are in fact partially born. To say otherwise is to deny physical reality.

2. Intent to Kill Does Not Negate Partial Birth

The United States Court of Appeals for the Third Circuit, in rejecting the argument that *Roe* is inapplicable to partial-birth abortion bans because a fetus “is in the process of being ‘born’ at the time of its demise,” stated that “[a] woman seeking an abortion is plainly not seeking to give birth.”¹⁷³ The court saw no need to conduct an independent evaluation as to whether the partial-birth procedure initiates a birth process. In fact, even to suggest that a partial birth occurs was to engage in “semantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion.”¹⁷⁴ The woman’s intent to kill indelibly marked the procedure as an abortion.

The court in *Causeway Medical Suite v. Foster*,¹⁷⁵ in refusing to view the partial-birth procedure as an actual partial birth, also stressed the woman’s intent—“to terminate her pregnancy”¹⁷⁶—but in addition relied upon the physician’s objective in initiating the alleged “process of birth.”¹⁷⁷ “[B]irth” is induced “artificially” in order to complete a “particular abortion procedure.”¹⁷⁸ This marks the procedure as an abortion, not “the killing of a child during delivery.”¹⁷⁹

To say that intent to kill precludes characterizing the partial-birth procedure as killing a partially born child is to say that “[t]here [are] no objective facts” about birth and the entity being killed.¹⁸⁰ Once the “fateful choice” to abort is made, “there

¹⁷¹ See *supra* notes 33-34 and accompanying text.

¹⁷² See *supra* note 146 and accompanying text.

¹⁷³ *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 143 (3d Cir. 2000).

¹⁷⁴ See *id.*

¹⁷⁵ 43 F. Supp. 2d 604 (E.D. La. 1999), *aff’d*, 221 F.3d 811 (5th Cir. 2000).

¹⁷⁶ *Id.* at 612.

¹⁷⁷ *Id.* at 618.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

¹⁸⁰ HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 276 (2002). Professor Arkes does not refer explicitly to the doctor’s intent to kill. He focuses on Judge

[is] no child to be killed, no birth to take place.”¹⁸¹ But intent to kill does not alter what has actually occurred in the real world—the partial emergence of a living baby from the woman's body. This physical reality should override anyone's intent.

Lawmakers have already embraced this principle in the different context of Born-Alive Infant Protection Acts. These laws, previously discussed, recognize that birth has in fact occurred when a fetus is completely separated from the woman, even when the separation results from induced abortion.¹⁸² The Acts thus subordinate the woman and doctor's common intent to kill to undeniable physical reality—the existence of a born, living baby.¹⁸³

Barry's opinion in the *Farmer* decision, which spoke only of the woman's intent. See *supra* notes 173-74 and accompanying text. Arkes thinks that “[i]f there was ever a decision that embodied the very vices it was decrying, this must surely have been it.” ARKES, *supra*. Why? Because Judge Barry eschews “objective facts” in favor of “perceptions, . . . 'semantics' and 'line-drawing.’” *Id.*

¹⁸¹ ARKES, *supra* note 180, at 276.

¹⁸² See, e.g., *supra* notes 81, 85, 164.

¹⁸³ The Federal Born-Alive Infants Protection Act was in part motivated by the “logical implications” of the *Farmer* decision [*supra* notes 173-74 and accompanying text], i.e.,

once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law . . . [T]here would, then, be no basis upon which the government may prohibit an abortionist from *completely* delivering an infant before killing it or allowing it to die. The ‘right to abortion,’ under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place.

H.R. REP. NO. 107-186, at 2 (2001). Some might criticize this perspective on *Farmer* as an alarmist interpretation of what the opinion actually said. Admittedly, there is nothing in Judge Barry's discussion of the significance of intention explicitly indicating that she would give the mother's intention to kill dispositive weight in assessing the legal status of a fully separated child. Still, this possible expansion of intention's impact has troubled others besides the House Committee. See *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting) (“If the intent of the mother controls the scope of her right to destroy her offspring, there is no reason why she should not be able to destroy the child after it has completely been separated from her body.”), *vacated*, 224 F. App'x 88 (2d Cir. 2007); ARKES, *supra* note 180, at 276. At least one abortionist has clearly indicated that he feels obligated to kill a fully separated living fetus “because ‘my ultimate job on any given patient is to terminate that pregnancy, which means that I don't want a live birth.’” *Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128, 152 (4th Cir. 2008) (Niemeyer, J., dissenting). Born-Alive Infant Protection Acts eliminate any uncertainty by according legal protection to living, fully separated babies, regardless of anyone's original intention to kill.

Intention to kill also does not change the physical reality of a partially born baby. As noted, Judge Posner believes that a state could criminally punish a doctor who, *at the request of the mother*, kills a baby in the birth canal.¹⁸⁴ The mother and doctor's intent to kill is no obstacle. Posner denies the partially born state of a baby killed during the partial-birth procedure,¹⁸⁵ but his rationale has been shown to be unpersuasive.¹⁸⁶ No one's intention to destroy should be allowed to mask the actual existence of these partially born babies.

This Part has shown that partial-birth abortion is not entitled to the *Roe/Casey* level of constitutional protection. Given that the procedure brutally kills a baby during its birth,¹⁸⁷ diminishing partial-birth abortion's constitutional status in itself would be a worthwhile accomplishment,¹⁸⁸ even if no practical consequences followed. But Part III will demonstrate that "demoting" partial-birth abortion in fact could have a significant impact.

III. CONSEQUENCES OF DIMINISHING PARTIAL-BIRTH ABORTION'S CONSTITUTIONAL STATUS

If partial-birth abortion does not qualify for protection under *Roe/Casey*, are there any constraints on majority will with respect to the procedure? This Part demonstrates that any legislation is still subject to "rational basis" review and that partial-birth abortion bans readily satisfy this standard. The Part then comments on some of the implications of using the correct evaluative standard in both the federal and state contexts.

¹⁸⁴ See *supra* text accompanying note 119.

¹⁸⁵ See *supra* text accompanying note 119.

¹⁸⁶ See *supra* notes 151-153 and accompanying text.

¹⁸⁷ See *supra* note 91 and accompanying text.

¹⁸⁸ As previously stated, moral repulsiveness alone does not mean lack of constitutional protection. See *supra* notes 76-78 and accompanying text. But a morally repellant practice should receive only the protection that is clearly mandated. Partial-birth abortion is not encompassed by the abortion right recognized in *Roe/Casey*.

A. Evaluating Partial-Birth Abortion Bans Under the Rational Basis Standard

The normal standard for evaluating legislative enactments is the rational basis test. *Williamson v. Lee Optical*,¹⁸⁹ a Supreme Court decision in the business realm, contains a classic explanation of this standard: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."¹⁹⁰ But the test applies beyond a commercial setting. In *Washington v. Glucksberg*,¹⁹¹ which upheld Washington's assisted-suicide ban, the Court stated that to survive constitutional scrutiny a law must only be "rationally related to legitimate governmental interests."¹⁹²

Do partial-birth abortion bans satisfy the rational basis standard? Are they reasonably related to furthering legitimate governmental interests? Justice Clarence Thomas has written that there is a clear governmental interest in "prohibiting a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life."¹⁹³ This quote reveals a legitimate governmental interest—promoting the value of human life—and a step rationally related to its promotion—banning an act "that approaches infanticide."¹⁹⁴ But does this phrase accu-

¹⁸⁹ 348 U.S. 483 (1955).

¹⁹⁰ *Id.* at 488. See also *Ferguson v. Skrupa*, 372 U.S. 726, 730 n.7 (1963) (quoting *Sproles v. Binford*, 286 U.S. 374, 388-89 (1932) ("When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment . . .")).

¹⁹¹ 521 U.S. 702 (1997).

¹⁹² *Id.* at 728. This was the proper test because the Court had first determined that assisted suicide is not a fundamental right. *Id.* Part II of this Article has established that the same is true of partial-birth abortion.

¹⁹³ *Carhart I*, 530 U.S. 915, 1006 (2000) (Thomas, J., dissenting).

¹⁹⁴ *Id.* In prohibiting an act "that approaches infanticide," Congress intervened to curtail any movement down a slippery slope toward actual infanticide. See *Carhart II*, 550 U.S. 124, 158 (2007). The Court in *Glucksberg*, in concluding that Washington's assisted suicide ban was "rationally related to legitimate government interests," 521 U.S. at 728, relied in part on the state's "fear that permitting assisted suicide [would] start it down the path to voluntary and perhaps even involuntary euthanasia." *Id.* at 732. In addition, Congress could reasonably "think that partial-birth abortion . . . undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." *Carhart II*, 550 U.S. at 160. Thus, a ban is rationally related to the legitimate govern-

rately describe the partial-birth procedure? Here is what one nurse observed:

The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.¹⁹⁵

While these facts seem to speak for themselves as to the accuracy of Justice Thomas's description—and to bans' resulting rationality¹⁹⁶—some have argued that partial-birth abortion bans are irrational because they do not prohibit the more common D&E method of killing a second trimester fetus—pulling it “from a woman's body in dismembered pieces.”¹⁹⁷ Justices Stevens and Ginsberg have especially advanced this argument¹⁹⁸ and, in doing so, have heavily relied upon an opinion of Judge Posner.¹⁹⁹ Posner's reasoning therefore warrants a closer look.

Posner's opinion was a dissent to a Seventh Circuit decision upholding partial-birth abortion bans in Illinois and Wisconsin

mental interest of “protecting the integrity and ethics of the medical profession.” *Id.* at 157 (quoting *Glucksberg*, 521 U.S. at 731).

¹⁹⁵ *Carhart I*, 530 U.S. at 1007 (Thomas, J., dissenting). The Court in *Carhart II* also relied on this description of the partial-birth procedure. 550 U.S. at 139.

¹⁹⁶ “The question whether . . . [there is] a legitimate interest in banning the procedure does not require additional authority. . . . In a civilized society, the answer is too obvious, and the contrary arguments too offensive, to merit further discussion.” *Carhart I*, 530 U.S. at 1007-08 (Thomas, J., dissenting).

¹⁹⁷ Gorney, *supra* note 33, at 33.

¹⁹⁸ See *Carhart II*, 550 U.S. at 181-82, 191 (Ginsburg, J., dissenting); *Carhart I*, 530 U.S. at 946-47 (Stevens, J., concurring); *id.* at 951-52 (Ginsburg, J., concurring). Their perspective has led to the further allegation that Congress's only purpose in enacting the Ban was to “chip away” at *Roe*. See *Carhart II*, 550 U.S. at 191 (Ginsburg, J., dissenting). See also Caroline Burnett, Comment, *The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. REV. 227 (2007). Similarly, it is asserted that state legislators have supported state bans only to “chip away at the private choice shielded by *Roe*.” *Carhart I*, 530 U.S. at 952 (Ginsburg, J., concurring). Judge Posner is credited for originating this “chipping away” characterization of legislative motives. *Id.* It will be shown that this view is untenable.

¹⁹⁹ See *Carhart II*, 550 U.S. at 191 (Ginsburg, J., dissenting); *Carhart I*, 530 U.S. at 946 (Stevens, J., concurring); *id.* at 951-52 (Ginsburg, J., concurring).

sin.²⁰⁰ He used an example of the abortion of a hydrocephalic baby to demonstrate the bans' irrationality:

If the physician performing the abortion crushes the fetus's skull in the uterus, killing the fetus while the fetus is still entirely within the uterus, he is not guilty of violating either of the statutes. . . . But if before crushing the fetus's skull the physician turns the fetus around so that its feet are protruding into the vagina, he has committed a felony.²⁰¹

Posner believes that to "any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus."²⁰² How can "the position of the feet"²⁰³ have any moral significance?²⁰⁴

Posner's argument fails in part because his facts are wrong. He incorrectly thinks that the partial-birth procedure kills the fetus when it is still entirely within the woman, i.e., its feet are "protruding into the vagina."²⁰⁵ Posner's misperception is made irrefutably clear in an earlier decision in the same lawsuit, in which he states that "death [occurs] while the body of the fetus [is] in the vagina."²⁰⁶ There is overwhelming evidence contradicting Posner's conclusion. In part due to instruments used to reduce the distance between the cervix²⁰⁷ and the outer vaginal opening, pulling the fetus into the vagina generally results in its body being in part, if not largely, outside the woman before it is killed.²⁰⁸

²⁰⁰ *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *rev'd*, 249 F.3d 603 (7th Cir. 2001) (reversed due to *Carhart I*).

²⁰¹ *Id.* at 879 (Posner, J., dissenting).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Posner says there is "[n]o reason of policy or morality that would allow the one [but] would forbid the other." *Id.* See *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 470 (7th Cir. 1998) (another Posner opinion in which he wonders "how a rational legislature could sense a moral difference between" the two different abortion methods).

²⁰⁵ *Hope Clinic*, 195 F.3d at 879 (Posner, J., dissenting).

²⁰⁶ *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 466 (7th Cir. 1998).

²⁰⁷ The cervix is the lower "neck of the uterus" through which a fetus moves into the vagina. See *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 382 (20th ed. 2001).

²⁰⁸ One doctor uses a ring forceps to pull the cervix toward the outer vaginal opening. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 874-75 (D. Neb. 2004), *aff'd sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007). Sometimes the

Posner's blindness to what the partial-birth procedure actually entails²⁰⁹ is richly ironic, for later in his opinion he criticizes public support for partial-birth abortion bans as based "on sheer ignorance of the medical realities of late-term abortion."²¹⁰ In purporting to instruct the "uninformed," he once more misstates the facts by asserting "that the only difference between [the partial-birth procedure] and the methods of late-term abortion that are conceded all round to be constitutionally privileged is which way the fetus's feet are pointing."²¹¹

While Posner persistently misstates the facts, Justices Stevens and Ginsberg are unwilling to confront them directly. In their concurring opinions in *Carhart I*, they do not even mention that the partial-birth procedure kills a fetus who is partially, if

cervix is pulled "to the level of the entrance to the vagina." *Id.* at 875. This in turn means that when the fetal head lodges at the cervix, "the fetal body past the level of the navel may be outside the woman's body." *Id.* at 874. For similar testimony by other doctors, see *id.* at 853, 860, 866, 869, 871, 877, and 881. Based on this evidence, the court concluded "that the cervix of the woman will frequently be at or very near the vaginal opening and sometimes even protruding outside the woman's body. Hence delivery of the fetal body, including the trunk past the navel, 'outside the body' customarily would be anticipated before the surgery begins." *Id.* at 1034 n.160. See also *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 335 n.4 (6th Cir. 2007) (stating that a tenaculum is used to "shorten[], if not eliminate[], the distance between the cervix" and the outer opening of the vagina), *cert. denied*, 128 S. Ct. 873 (2008); *infra* note 214 (Justice Kennedy's acceptance of testimony that fetal death occurs when all but the fetus's head is outside the woman's body). The Federal Ban, of course, does not even apply unless either the fetus's head or half its lower body "is outside the body of the mother." See *supra* note 32 and accompanying text. This is also true of State bans that use the same limiting language, such as Virginia's recently upheld Partial-Birth Infanticide Ban. See *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 169 & n.1 (4th Cir. 2009). The statutes that Judge Posner criticized, however, did not make ban application conditional on some described part of the fetus being outside the woman at the time of fetal death. The Illinois and Wisconsin statutes spoke only of "partially vaginally deliver[ing] a living human fetus or infant." See *Hope Clinic v. Ryan*, 195 F.3d 857, 862-63 (7th Cir. 1999), *rev'd*, 249 F.3d 603 (7th Cir. 2001) (reversed due to *Carhart I*). Nonetheless, the evidence shows that "partially vaginally deliver[ing]" a fetus necessarily involves dragging the fetus partially, if not largely, outside the woman's body.

²⁰⁹ Posner is not alone in his mistake. As noted, Professor Laurence Tribe misunderstands the procedure, *supra* notes 110-12 and accompanying text, as does Judge Maryanne Barry, *supra* note 74. She thinks that a partial-birth abortion ban is "nonsensical" because it bases "the demarcation line between abortion and infanticide . . . on where in the woman's body the fetus expires during an abortion." *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 144 (3d Cir. 2000).

²¹⁰ *Hope Clinic v. Ryan*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, J., dissenting), *rev'd*, 249 F.3d 603 (7th Cir. 2001).

²¹¹ *Id.*

not largely, outside the woman's body. Similarly, in their dissent in *Carhart II*, they only refer (unfavorably) to any line between "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed."²¹² "[W]here a fetus is anatomically located" is a phrase well-calculated to mask the reality lying behind the nurse's observation²¹³—moving fingers and kicking feet were visible because they had already emerged from the woman.²¹⁴

Because Judge Posner and Justices Stevens and Ginsberg never directly engage the reality of the partial-birth procedure, it is hard to take seriously their assertions of ban irrationality. Professor Cynthia Gorney, however, does not dissemble, but graphically describes the partial-birth procedure, including the fact that "the baby's body is exposed" when it is killed,²¹⁵ i.e., its body is largely outside the woman. Despite her clear-eyed recognition of this crucial fact, Gorney too argues that a ban, because it does not prohibit the classic D&E technique, "makes clear ethical sense only to people who don't spend much time thinking about abortion."²¹⁶ "[I]sn't it ethically repugnant to press the case that one method of ending fetal life is worse than another? Isn't this like arguing about whether murder by gunshot is societally preferable to murder by strangulation?"²¹⁷

²¹² 550 U.S. at 186.

²¹³ See *supra* text accompanying note 195.

²¹⁴ "Witnesses to the procedure relate that the fingers and feet of the fetus are moving prior to the piercing of the skull; when the scissors are inserted in the back of the head, the fetus' body, *wholly outside the woman's body* and alive, reacts as though startled and goes limp." *Carhart I*, 530 U.S. 914, 963 (2000) (Kennedy, J., dissenting) (emphasis added) (statement obviously refers to the nurse's testimony, see *supra* text accompanying note 195). The Federal Ban, of course, in instances of feet-first deliveries like the one observed by the nurse, does not even apply unless the fetus's body from above the navel is outside the woman. See *supra* note 32 and accompanying text.

²¹⁵ Gorney, *supra* note 33, at 34.

²¹⁶ *Id.* at 33.

²¹⁷ *Id.* at 44. Gorney specifically addresses these two questions to "the dedicated right-to-life person," *id.*, but her article in effect poses them more generally—via her assertion that because "pulling a fetus from a woman's body in dismembered pieces is legal, medically acceptable, and safe," it makes no "ethical sense" to criminalize the partial-birth procedure. See *id.* at 33. Although it will be shown that this argument is deeply misguided, it has broad support. See, e.g., Nussbaum, *supra* note 13, at 84 (*Carhart II*'s "allusions to the state's respect for fetal life spin like an idle wheel, given that the holding does not actually protect fetal lives, in that it permits a range of alternative

Professor Gorney's question deserves a straightforward answer. Before I do so, however, it is important to emphasize the precise legal issue under discussion—whether partial-birth abortion bans are rationally grounded. The question thus is not whether one agrees or disagrees with Gorney's critique. Nor is the question whether ban supporters can convince everyone else to endorse bans. Rather, all that ban proponents must do is make a rational case for their position.²¹⁸ This task is readily accomplished, as one of Gorney's own illustrations makes clear.

Gorney points out that a woman twenty-eight weeks pregnant who wants an abortion to better fit her prom dress can legally get one under *Roe*.²¹⁹ Does this mean that it makes no

techniques for late-term abortion”) (footnote omitted); *supra* text accompanying notes 110-111 (Professor Laurence Tribe's similar argument). Cf. Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 849 & n.27 (2007) (in view of alternative permissible ways to kill the fetus, *Carhart II* can be criticized for emphasizing the state interest in potential life); Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe's End*, 51 ST. LOUIS U. L.J. 655, 661-62 (2007) (legal alternatives of killing the fetus demonstrate that partial-birth abortion bans serve only the state's “ideological or symbolic interests”).

²¹⁸ Consider Justice Kennedy's response in *Carhart I* to Justices Ginsberg's and Stevens's assertion that Nebraska's partial-birth abortion ban was irrational because it did not prohibit D&E abortion:

The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. . . . [The partial-birth procedure's] stronger resemblance to infanticide means Nebraska could conclude . . . [it] presents a greater risk of disrespect for life and a consequent greater risk to the [medical] profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion.

530 U.S. at 962-63 (Kennedy, J., dissenting).

²¹⁹ Gorney, *supra* note 33, at 40. This observation succinctly captures *Roe*'s impact on state attempts to limit either the permissible reasons for abortion or the point during pregnancy at which abortion is no longer allowed—*Roe* slammed the door on all such regulatory efforts. Gorney thus acknowledges the validity of abortion opponents' summary of the *Roe* standard: “[L]egal at any time, for any reason, all the way through the ninth month of pregnancy.” See *id.* at 39-40. This permissiveness is mandatory due to the broad nature of the health exception that limits a state's power to prohibit even post-viability abortions. *Id.* at 39. See *infra* text accompanying note 227. Gorney's accuracy in describing *Roe* is commendable. Incorrect depictions are legion, in particular those stating that *Roe* only prohibited state restrictions on early abortions. Most surprisingly, even Justice O'Connor has made this mistake. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 45 (2003) (*Roe* “struck down as unconstitutional limitations by states on abortions in the first three months of pregnancy”). For additional examples, see Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 24 n.4 (Jack M. Balkin ed., 2005) (describing a 2003 ABC News-

"ethical sense" to punish as infanticide the killing of babies of that age who have been born prematurely? Of course not. Prohibiting the killing of born infants is essential in any civilized society. Gorney shares this view,²²⁰ despite her awareness that society, due to *Roe*, cannot effectively prohibit the killing of the same baby within the womb.

If protecting babies born prematurely is rational, then so are partial-birth abortion bans. The partial-birth technique kills a baby in the midst of a birth process, just inches from being fully born. Bans are thus supported by the same moral reasoning underlying laws punishing infanticide. Interestingly, Posner provides unintended corroboration in the two opinions already cited. In his heralded 1999 dissent, he defends laws against infanticide because it, unlike feticide, occurs after birth. "Once the baby emerges from the mother's body," Posner opined, killing it can no longer be justified.²²¹ But there is a right to kill "as long as the baby remains within the mother's body."²²² In the partial-birth process the baby is killed—despite Posner's apparent unawareness of the fact—when it no longer "remains within the mother's body."²²³ Why then is it irrational to prohibit the procedure? In his 1998 opinion, Posner "do[es] not doubt" that a state could criminalize the "killing [of] a live baby that is half-

Washington Post poll that characterized *Roe* "as giving women the ability to get abortions if they want one at any time during the first trimester"); Gregg Easterbrook, *Abortion and Brain Waves*, THE NEW REPUBLIC, Jan. 31, 2000, at 21, 24 (*Roe* "all but ban[ned]" abortion in the third trimester); and Manny Fernandez, *Abortion Protest Draws Thousands*, WASH. POST, Jan. 23, 2004, at B1 (*Roe* "prevented states from restricting abortion in the first trimester of pregnancy"). For other examples of accurate descriptions of *Roe*, see David Brown, *Late Term Abortions; Who Gets Them and Why*, WASH. POST, Sept. 17, 1996, at Z12 ("Contrary to a widely held public impression, third-trimester abortion is not outlawed in the United States. . . . [L]ife-threatening conditions need not exist in order for a woman to get a third-trimester abortion."), and Roy Rivenburg, *supra* note 30, at E8 ("If a woman can find a doctor who says her emotional health is disturbed by a pregnancy, she can get an abortion at *any* stage of pregnancy.").

²²⁰ Professor Gorney has referred to infanticide as an "unquestionable wrong." See GORNEY, *supra* note 40, at 346. While this does not necessarily connote her support of laws against the practice, elsewhere she has implicitly assumed the legitimacy of laws against "child-killing." See Cynthia Gorney, *Reversing Roe: Is Mainstream Right-to-Life Ready for an Abortion Ban?*, THE NEW YORKER, June 26, 2006, at 46, 52.

²²¹ *Hope Clinic v. Ryan*, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, J., dissenting), *rev'd*, 249 F.3d 603 (7th Cir. 2001).

²²² *Id.*

²²³ See *supra* notes 206-08 and accompanying text.

born.”²²⁴ It has been shown that this is precisely what the partial-birth procedure entails.

Nor are bans rendered irrational by their failure to prohibit classic D&E.²²⁵ Judge Posner, a chief proponent of this view, contradicts himself by acknowledging that a state can appropriately criminalize “as infanticide” the killing of a baby in the birth canal during “the course of a normal labor.”²²⁶ But, as Professor Gorney has correctly stated, *Roe* allows the abortion of even a full-term baby: “If the doctor attests that she needs it . . . the state is not supposed to interfere, no matter how advanced her pregnancy is.”²²⁷ Why then, if partial-birth abortion bans are irrational due to their failure to cover D&E, isn’t Posner’s defense of such infanticide laws also irrational due to their failure to ban full-term abortions? Both laws criminalize killing a baby while it is emerging from its mother, but neither prohibits killing that same baby before it begins to emerge. Consequently,

²²⁴ *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998). See *supra* notes 119-121 and accompanying text.

²²⁵ In the *Carhart II* oral arguments, Justice Ginsburg rejected as “beside the point” the Solicitor General’s ban defense based on concerns about infanticide. Transcript of Oral Argument at 16, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-380). Why? Because bans do not prohibit the killing of the same fetus “inside the womb.” *Id.* at 4. In response, the Solicitor General asked Justice Ginsburg to consider a “lawful post-viability abortion”:

There is a problem with the mother’s health, there is a problem with her life so it’s a lawful post-viability abortion. I don’t think that anybody thinks that the law is or should be indifferent to whether in that case fetal demise takes place in utero or outside the mother’s womb. The one is abortion, the other is murder.

Id. at 16. This reply admittedly was somewhat opaque. Its intended, compelling point was that the freedom to kill a child in the womb does not bestow unlimited power to kill it regardless of its location. See *supra* notes 219-20 and accompanying text. But the Solicitor General, in addition to making post-viability abortions sound more restricted than they are, see *supra* note 219 and accompanying text, failed to clarify what “outside the mother’s womb” scenario he had in mind—presumably a premature birth. In any event, Justice Ginsburg either missed or deliberately ignored the point the Solicitor General was trying to make. She replied that “if this case were limited to post-viability abortions it would be a different matter.” Transcript, *supra* at 17. This comment is completely non-responsive. If bans applied only post-viability, women still could freely have their viable babies killed in utero. See *supra* note 219 and accompanying text. Would post-viability bans therefore be irrational? It thus is clear that Justice Ginsburg in no meaningful sense “corrected” the Solicitor General’s emphasis on infanticide prevention, as has been claimed. See Burnett, *supra* note 198, at 261.

²²⁶ See *supra* notes 119-20 and accompanying text.

²²⁷ Gorney, *supra* note 33, at 39. See *supra* note 219 and accompanying text.

either both laws are irrational or neither is. I obviously endorse the latter option.²²⁸ The emergence of a child from the mother's body has a broader significance than Posner is able to acknowledge. Once the birth process begins—whatever its nature—the child is a proper subject of governmental protection untrammelled by *Roe*.²²⁹

The gap in ban coverage admittedly leaves most second trimester fetuses unprotected. But any effort to criminalize D&E would plainly be stricken under the *Roe/Casey* standard. Ban proponents can hardly be branded as “irrational” for failing to prohibit what cannot be constitutionally prohibited.²³⁰ They acted prudently by attacking what was constitutionally open to attack, whether under the theory defended in this Article—that the partial-birth procedure is not encompassed by the abortion right—or on the grounds that *Roe/Casey* permit partial-birth abortion bans.

It is hardly novel for lawmakers to combat incrementally what they believe to be evil. Abraham Lincoln first fought slavery by attempting to restrict its expansion, which he believed the Constitution allowed.²³¹ He delayed assaulting the institu-

²²⁸ Additional support for the rationality of partial-birth abortion bans comes from information on how English physicians are advised to handle the problem of fetuses born alive following abortion attempts. Under English law, such a fetus, if viable, “becomes a child and a deliberate act that causes the death of a child is murder, even if that deliberate act precedes the birth.” Vadeyar, et. al., *supra* note 83, at 1159. The authors therefore state “that if an abortion is taking place at a gestation at which the fetus is capable of remaining alive it is imperative that feticide is performed prior to delivery.” *Id.* Does the fact that a fetus can legally be killed before delivery discredit the law designed to protect it after its birth? The obvious answer is “no.” Similarly, laws protecting fetuses in the delivery process make “ethical sense,” contrary to Professor Gorney's assertion, *supra* text accompanying note 216, even though those same fetuses could be legally killed moments before. (For the argument that it is irrelevant that most fetuses killed via the partial-birth procedure are not viable, see *supra* notes 159-72 and accompanying text.)

²²⁹ *But cf. infra* notes 251-67 and accompanying text (discussing how the protection *Roe* affords to dismemberment D&Es impacts partial-birth abortion bans).

²³⁰ Similarly, opponents of pornography are not irrational for failing to seek to criminalize the private possession of pornography, —since such an effort would inevitably fall to constitutional challenge. See *Stanley v. Georgia*, 394 U.S. 557 (1969). But they also are act rationally in enacting constitutionally permissible prohibitions of the private possession of child pornography. See *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

²³¹ See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262 (Roy P. Basler ed., 1953).

tion of slavery itself until changed circumstances made that constitutionally permissible.²³² Legal change may someday permit legislatures so inclined to accord more protection to fetal life. Until that day comes, defending the lives of fetuses who have begun the birth process is a cause to be praised, not belittled as irrational.²³³

B. Implications for Federal and State Bans

1. Federal Ban

Carhart II left the door open for an as-applied challenge to the Federal Ban due to its lack of a health exception.²³⁴ But it can be argued that under a rational basis standard a health exception is unnecessary. Lawmakers acted to prohibit partial-birth abortion because it closely approaches infanticide. Surely no one thinks that a law prohibiting infanticide must have a health exception. There is no reason to treat partial-birth abortion bans differently. In fact, differential treatment—requiring a health exception—would be especially inappropriate because bans are inapplicable if the fetus is killed prior to its partial de-

²³² The Emancipation Proclamation, for example, was not issued until Lincoln felt it could be justified “[a]s a military measure” to deprive the enemy of property. See DAVID HERBERT DONALD, *LINCOLN* 456 (1995).

²³³ Ban opponents are not the only ones who have criticized bans’ emphasis upon fetal location. At least one pro-life advocate has expressed concern about stressing physical location in defending the value of human life. To Richard Stith, “location cannot make an ontological difference.” Stith, *supra* note 104, at 263. In terms of their “real worth,” it does not matter whether humans are within the womb, partially outside the womb, or wholly outside the womb. See *id.* at 261, 272. Rather, “human nature, membership in our species,” is what actually underlies “human dignity.” *Id.* at 272. From this perspective, partial-birth abortion bans are problematic because they are grounded on a morally irrelevant factor—physical location. But in this regard aren’t partial-birth abortion bans like Born-Alive Infant Protection Acts? Physical location—complete separation—is what puts the latter beyond *Roe*’s scope. See *supra* notes 80-86 and accompanying text. They thus erect “a barrier to stop the right to choose from expanding beyond birth.” Stith, *supra* note 104, at 275. But, as Professor Stith recognizes, the laws do not interfere “with the right to life expanding into pregnancy.” *Id.* Partial-birth abortion bans are no different. They move the barrier to choice back a little further—to the birth process—but they do not preclude the argument that wholly intrauterine life should be protected as well. Any attempt, however, to further protect prenatal life is currently stymied by *Roe*. But see *infra* note 272.

²³⁴ See *supra* note 18 and accompanying text.

livery.²³⁵ Thus, by killing the child while it is still in the womb,²³⁶ any perceived health benefits that intact deliveries offer women arguably can still be realized without thwarting the purpose of deterring infanticide.²³⁷

2. State Bans

The potential impact of a rational basis analysis on state partial-birth abortion laws is a complicated subject, and it is beyond the scope of this Article fully to explore it. Rather, the types of issues that might arise²³⁸ will be indicated by briefly considering two state bans—in Virginia and Michigan—whose constitutionality has been assessed subsequent to *Carhart II*. The key inquiry in both cases was whether the challenged bans²³⁹ conformed closely enough to the Federal Ban to be upheld.

Virginia's ban was initially stricken by a Fourth Circuit panel because, unlike the Federal Ban, it was interpreted to apply to doctors intending to perform dismemberment D&Es, but who instead accidentally bring an intact fetus substantially outside the woman.²⁴⁰ Since regular D&E is the most common

²³⁵ See *Carhart II*, 550 U.S. 124, 147-48, 164 (2007).

²³⁶ Common methods include injecting "the fetus with a toxic agent such as potassium chloride or digoxin." *Evans v. Kelley*, 977 F. Supp. 1283, 1318 (E.D. Mich. 1997).

²³⁷ Justice Ginsberg rejects this assertion due to the health risks associated with killing the fetus via injection. *Carhart II*, 550 U.S. at 180 n.6. The weakness in this argument is the apparent routineness with which prior fetal demise is induced. Dr. Leroy Carhart, for example, almost always does so for fetuses of at least eighteen weeks gestational age. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 854, 907-08 (D. Neb. 2004), *aff'd sub nom.*, *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007). Further, the *Los Angeles Times* reported that of the 3,000 to 5,000 yearly partial-birth procedures known to one abortion proponent in 1995, *every single one* was preceded by killing "the fetus in the womb—by injecting it with poison or cutting the umbilical cord." Rivenburg, *supra* note 30 at E8. This high incidence of killing the fetus beforehand must mean that doctors have determined that doing so is not particularly risky.

²³⁸ The lack of a health exception could also be grounds for challenging state bans, if, for example, a state decided that its constitution provides more protection to the abortion right than that conferred by the United States Constitution. The potential impact of a rational basis analysis on the asserted requirement of a health exception has already been discussed. See *supra* notes 234-37 and accompanying text.

²³⁹ Michigan's statute was not worded as a ban of the partial-birth procedure, see *infra* notes 245-46 and accompanying text, but that plainly was its purpose.

²⁴⁰ *Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128, 137-39 (4th Cir. 2008), *rev'd en banc*, 570 F.3d 165 (4th Cir. 2009). The Federal Ban does not apply to such

second-trimester abortion technique, subjecting doctors who perform it to the risk of prosecution was held to impose an undue burden on the woman's abortion right.²⁴¹ The Fourth Circuit, en banc, reversed and upheld the statute.²⁴² The court acknowledged that the Virginia ban differs from the Federal Ban by covering doctors who intend a D&E, but unintentionally cause an intact partial delivery.²⁴³ Nonetheless, the ban was constitutional because it has other features that "clearly delineate[] the rare circumstances in which a doctor [would] incur liability, thus enabling a doctor to perform a standard D&E without fear that accidental [substantial] emergence of the fetus" would in itself result in criminal prosecution.²⁴⁴

Michigan's statute did not even mention the partial-birth procedure. Instead, "it creates a protected legal status for a partially-delivered fetus that it terms a 'perinate.'"²⁴⁵ A perinate is

situations because it requires that a doctor have had the intent to initiate an intact procedure: "If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability." *Carhart II*, 550 U.S. at 151.

²⁴¹ See *Richmond Med. Ctr. For Women*, 527 F.3d at 145-46.

²⁴² *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009) (en banc).

²⁴³ *Id.* at 176.

²⁴⁴ *Id.* at 179. Consider, for example, a doctor who intends to procure a dismemberment D&E, but instead faces a substantially delivered fetus whose head is "lodged in the cervix." *Id.* at 178. The court believed that this situation would "almost always endanger the mother's life." *Id.* The Virginia ban's life-of-the-mother exception would allow the doctor to "complete the D & E procedure . . . [with] an unequivocal affirmative defense to any criminal liability under the Virginia Act." *Id.*

²⁴⁵ *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 327 (6th Cir. 2007), cert. denied, 128 S. Ct. 873 (2008). The statute in dispute, the Legal Birth Definition Act, MICH. COMP. LAWS ANN. §§ 333.1081-85 (West Supp. 2008), was Michigan's third attempt to prohibit the partial-birth procedure. Its first effort, a partial-birth abortion ban, was struck down in *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997). Its second effort, entitled the Infant Protection Act, was invalidated in *WomanCare of Southfield v. Granholm*, 143 F. Supp. 2d 827 (E.D. Mich. 2000). The third attempt, entitled the Legal Birth Definition Act, was passed in 2003, but vetoed by the Governor. See Betsy DeVos, *Voters Rebut Partial-Birth Abortion Veto*, THE GRAND RAPIDS PRESS, June 24, 2004, at A15, available at 2004 WLNR 17813169. It was passed again in 2004, having been proposed by an initiative petition, a process that insulated the measure from the Governor's veto power. *Id.* The petition drive garnered over 460,000 signatures. *Id.* This third effort also ultimately failed. See *Northland Family Planning Clinic, Inc., v. Cox*, 394 F. Supp. 2d 978 (E.D. Mich. 2005), aff'd, 487 F.3d 323 (6th Cir. 2007), cert. denied, 128 S. Ct. 873 (2008). Undeterred, Michigan lawmakers in 2008 passed another partial-birth abortion ban, but it was vetoed by Governor Jennifer Granholm. See Chris Christoff, *Gov. Granholm Vetoes Abortion Bill, Mandatory Helmet Bill*, DETROIT FREE PRESS, June 13, 2008, available at 2008 WLNR 11198631. An override attempt was contemplated. *Id.* At

"a live human being at any point after which any anatomical part of the human being is known to have passed beyond the . . . [outer vaginal opening] until the point of complete expulsion or extraction from the mother's body."²⁴⁶ The Sixth Circuit invalidated the statute because it lacked those "anatomical landmarks," i.e., the entire head or the body from above the navel downward, that ensure the Federal Ban does not apply to D&E's.²⁴⁷ Because the challenged statute prohibited standard D&E abortions, it imposed an unconstitutional undue burden on the abortion right.²⁴⁸

How might the introduction of a rational basis analysis have impacted the resolution of these two cases? Concerning the issue raised in the Virginia litigation, a constitutional challenge to bans applicable to doctors who do not from the outset intend to procure an intact, partial delivery would seemingly more likely fail under a rational basis approach than under the *Carhart II* analysis, premised in *Roe/Casey*. After all, an abortionist's intent surely is irrelevant to the legislative goal of preventing infanticide. If an intact, living fetus is partially born, killing it constitutes infanticide no matter what abortion technique was initially intended. The recent Fourth Circuit decision, though, shows that such an expanded ban can be upheld even under *Carhart II*.²⁴⁹ As stated by Judge Wilkinson's concurring opinion, "[t]he state's interest in protecting life recognized in [*Carhart II*] does not vanish when the intact delivery of the child is unintentional. . . . The state may prohibit a deliberate and unconscionable act against the intact, partially born child, regardless of how the child got there."²⁵⁰ Consequently, a rational basis

present, another ban, introduced in 2009 and tracking the language of the Federal Ban, is under consideration by the Michigan legislature. Partial Birth Abortion Ban Act., S.B. 147, 148; H.B. 4212, 4213 (2009).

²⁴⁶ *Northland Family Planning Clinic*, 487 F.3d at 327.

²⁴⁷ *Id.* at 336-37. The statute is triggered when "any anatomical part" passes outside the woman. *Id.* at 327. "Anatomical part" means any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." MICH. COMP. LAWS ANN. § 333.1085(a) (West Supp. 2008).

²⁴⁸ *See Northland Family Planning Clinic*, 487 F.3d at 336-37.

²⁴⁹ *See supra* notes 242-44 and accompanying text.

²⁵⁰ *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 181 (4th Cir. 2009) (Wilkinson, J., concurring) (en banc).

approach is not an absolute prerequisite for according constitutional legitimacy to broader bans.

But a potential constitutional obstacle remains—the possible negative impact of more expansive bans on the availability of dismemberment D&Es.²⁵¹ These standard D&Es do not involve partial births,²⁵² and thus would still be subject to *Casey*'s undue burden standard. One could defend a broader ban's constitutionality by following the lead of the Fourth Circuit in ultimately upholding Virginia's ban—emphasize other statutory safeguards that would protect doctors from liability in such instances.²⁵³ This approach convinced the six judges in the majority, but not the five dissenting judges, who thought that the alleged protections for doctors performing dismemberment D&Es were inadequate.²⁵⁴ A rational basis approach would provide a way to avoid this debate about the effectiveness of Virginia's particular statutory safeguards. As noted, partial-birth abortion bans already provide a safe harbor for abortionists who do not want to risk prosecution—kill the fetus before taking action that could lead to its intact extraction. An injection to stop the fetal heart makes a ban violation impossible.²⁵⁵ Subjecting an abortionist to this choice arguably is justified by the legitimate governmental purpose of deterring infanticide.²⁵⁶ Nor is injection barred by concern for health risks to the woman. While there is some risk,²⁵⁷ it is counterbalanced by the health advantages of

²⁵¹ The Fourth Circuit panel initially struck down the Virginia ban for precisely this reason. *See supra* notes 240-41 and accompanying text.

²⁵² *But see* the discussion in *infra* notes 260-61 and accompanying text.

²⁵³ *See supra* note 244 and accompanying text.

²⁵⁴ The dissenters believed that the majority's interpretation of the life-of-the-mother exception was flawed because it would also permit even intentional partial-birth extractions to proceed without liability for the doctor. 570 F.3d at 193-94 (Michael, J., dissenting).

²⁵⁵ *See supra* text accompanying note 235.

²⁵⁶ Critics would undoubtedly brand this suggestion as "irrational" because if the injection alternative kills the fetus, how can one reasonably claim that it furthers a state interest against infanticide? This critique, like the similar criticism based on bans' inapplicability to D&E abortion, gives insufficient weight to a fetus's location at the time of its death. *See supra* notes 219-33 and accompanying text.

²⁵⁷ *See supra* note 237.

avoiding a dismemberment D&E.²⁵⁸ Injection is also a more humane way to kill the fetus.²⁵⁹

Concerning the Michigan statute, this Article has earlier stressed that the anatomical landmarks it lacks ensure that the partial-birth procedure does entail, contrary to Judge Posner's assertion, killing a "half-born" baby.²⁶⁰ But if the *Roe* abortion right is delimited by the onset of birth,²⁶¹ should a state be permitted to extend legal protection to babies emerging from the mother's body, but not yet "half-born"? A living, intact baby begins the birth process whenever any part of its body, however small, emerges from its mother. This is so even when caused by an abortionist's pulling an extremity outside the womb for the

²⁵⁸ The decisions are replete with assertions that D&Es pose greater health risks to women than the partial-birth procedure. These reputed safety disadvantages were the principal factual basis for the view that partial-birth abortion bans must include a health exception. *See, e.g.,* Carhart v. Gonzales, 413 F.3d 791, 801-02 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1000-01 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007).

²⁵⁹ One motivation behind the Federal Ban was concern over fetal pain: "[D]uring a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain." Congressional Finding 14(M), in notes following 18 U.S.C. § 1531 (Supp. V 2000). Many of the ban cases contain discussions of the fetus's capacity to feel pain. The conclusions expressed vary. One federal district judge accepted as a fact "unrebutted . . . credible evidence that . . . [the partial-birth procedure] subject[s] fetuses to severe pain." Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004), *aff'd sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007). Another judge found that "[t]he issue of whether fetuses feel pain is unsettled in the scientific community." Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1002 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007). In any event, the court said the issue is irrelevant, for if a fetus does feel pain, it would experience "no less and in fact [what] might be greater [pain]" in a D&E abortion. *Id.* A third judge assumes that a non-viable fetus is able to feel pain "at some point during its gestation," but believes the issue to be only "marginally" legally relevant, if at all, in part because all methods of killing the fetus would be painful. Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1029 (D. Neb. 2004), *aff'd sub nom.* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007). While the court suggests that it is impossible to differentiate levels of pain between death by being "torn apart" in a D&E abortion versus death by heart stoppage due to injection, *see id.*, this conclusion is plainly counterintuitive.

²⁶⁰ *See supra* notes 207-08 and accompanying text.

²⁶¹ *See supra* notes 87-121 and accompanying text.

purpose of initiating a dismemberment D&E.²⁶² Despite this factual reality, a legislature can only protect what the Court allows to be protected. A triggering standard of “any anatomical part” reveals a contradiction in the impact of *Roe*, even if properly interpreted. A partial-birth prohibition at this earliest stage of delivery should be allowed due to *Roe*’s “onset of birth” limitation, but any such ban would impermissibly infringe upon the right to a D&E abortion.²⁶³

One solution to this dilemma²⁶⁴ would be to rewrite the Michigan statute to track the Federal Ban, thus presumably ensuring constitutional validity. But this obviously sacrifices the principle that any partially born baby is a proper subject of state protection.²⁶⁵ An alternative is to argue that the present Michigan statute satisfies the rational basis test. After all, there is no meaningful moral distinction based on how much of a baby

²⁶² Justice Thomas, in *Carhart I*, argued that standard D&Es do not involve birth because the concept of “delivery” does not encompass removing “the child from the uterus piece by piece.” *Carhart I*, 530 U.S. 914, 990 (2000) (Thomas, J., dissenting). The dismemberment that D&Es entail, however, usually does not occur completely within the womb. See *infra* note 263. Thus, a baby typically is still living and intact when its first limb is torn off.

²⁶³ A D&E abortion typically does not tear the fetus apart completely inside the womb. Rather, the doctor pulls a fetal body part, e.g., a leg, out of the womb and often outside the woman altogether before wrenching it off. The disarticulation is possible due to the resistance caused when the rest of the fetus’s body lodges at the cervix. Thus, in a D&E abortion, there will often be times when an intact fetus is partially drawn outside the woman before it is killed. See, e.g., *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 860, 866, 871, 877-78 (D. Neb. 2004), *aff’d sub nom.* *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev’d*, 550 U.S. 124 (2007). Applying a partial-birth abortion ban to this situation would obviously subject doctors who perform D&E’s to the risk of a ban violation. Cf. *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 497 & n.11 (expressing concern that interpreting *Roe* as inapplicable to partially born fetuses “could potentially exclude all conventional abortion procedures from constitutional protection”), *aff’d sub nom.* *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000). This result could be avoided by retaining the previously criticized intention requirement. See *supra* text accompanying note 249.

²⁶⁴ It might be argued that the very existence of this dilemma demonstrates that the interpretation of *Roe* defended in this Article is incorrect. After all, is it plausible that the Court would have written a self-contradictory opinion? The problem with this critique is that rejecting the “*Roe* is inapplicable” perspective does not avoid the issue of self-contradiction. If *Roe* is interpreted as still applying once the birth process begins, then what is one to make of all the evidence suggesting that this is not what the *Roe* Court intended? See *supra* notes 92-141 and accompanying text.

²⁶⁵ It would also sacrifice the argument that the intention of the doctor should be irrelevant to the legal protection offered to partially born babies. See *supra* text accompanying note 249.

is outside the woman.²⁶⁶ Doctors' freedom to perform D&E's can be preserved by the practice of killing the fetus before beginning any D&E procedure.²⁶⁷

CONCLUSION

With respect to what he calls "live-birth abortion," Justice Scalia thinks it "is quite simply absurd" to believe "that the Constitution of the United States . . . prohibits . . . banning this visibly brutal means of eliminating our half-born posterity."²⁶⁸ Scalia is correct, but for reasons beyond those given in his opinion.²⁶⁹ As has long been argued, the partial-birth procedure is not encompassed by the abortion right conferred by *Roe*.²⁷⁰ Consequently, current partial-birth jurisprudence applies the wrong test. State bans and the Federal Ban are properly subject only to rational basis review.

Prominent ban critics, including Judge Posner and Justices Stevens and Ginsberg, assert that bans are irrational because they do not prohibit D&E abortion. To them, the right to kill by one method bestows an unrestrained right to kill. But D&E is

²⁶⁶ It can also be argued that there is no meaningful moral distinction based on whether *any* of the baby is outside the woman. See *supra* note 233. But some part of a living, intact fetus must be outside of the woman to trigger the "*Roe* is inapplicable" argument.

²⁶⁷ See *supra* notes 255-56 and accompanying text. As previously discussed, this alternative arguably does not impermissibly put women's health at risk, see *supra* notes 257-58 and accompanying text, and also is supported by humanitarian concern for the fetus. See *supra* note 259 and accompanying text.

²⁶⁸ *Carhart I*, 530 U.S. at 914, 953 (2000) (Scalia, J., dissenting). Scalia's quote speaks to the specific issue of whether the Constitution prohibits state bans, but he no doubt would say the same thing in reference to the Federal Ban. See *Carhart II*, 550 U.S. at 145-46 (Justice Kennedy's majority opinion, which Justice Scalia joined, argues that *Casey*'s emphasis on the legitimate state interest in fetal life requires sustaining the Federal Ban against constitutional challenge).

²⁶⁹ Justice Scalia believed that *Casey* did not support the Court's decision to invalidate Nebraska's ban. See *Carhart I*, 530 U.S. at 953-54 (Scalia, J., dissenting). Whether Justice Scalia was correct as to how *Casey* should be applied to state partial-birth abortion bans is beyond the scope of this Article, which instead argues that such statutes are not subject to *Casey*.

²⁷⁰ This Article attempts to establish this proposition beyond challenge. At the very least, it is hoped that the Article demonstrates that the "*Roe* is inapplicable" argument has substantial merit and that courts have been wrong to respond to it dismissively or derisively. See *supra* notes 65-74 and accompanying text.

protected by *Roe*, whereas the partial-birth procedure is not.²⁷¹ Lawmakers thus have much more freedom to act against the latter.²⁷² Because they can reasonably conclude that killing a child during its birth verges on infanticide, banning the partial-birth procedure plainly satisfies the rational basis test.

²⁷¹ The principal point of this Article is that *Roe*, properly interpreted, does not apply to killing a baby during its birth. There is, of course, an alternative argument for the constitutionality of partial-birth abortion bans. As *Carhart II* demonstrates, bans can be written in a way that satisfies the *Roe/Casey* standard.

²⁷² For an argument that *Carhart II* opens the door to banning dismemberment D&Es, see Stephen G. Gilles, *As Justice Kennedy Said . . .*, FIRST THINGS, Jan. 2008, at 18, available at <http://www.firstthings.com/article/2007/12/002-as-justice-kennedy-said--6>. Evaluating this contention is beyond the scope of this Article.



LIABILITY OF WEB 2.0 INTERMEDIARIES UNDER STATE CONSUMER FRAUD STATUTES: A CASE STUDY

*Anthony Ciolli**

On March 18, 2008, New Jersey Attorney General Anne Milgram announced that her office, together with the New Jersey Division of Consumer Affairs, had begun a state investigation into the operations of JuicyCampus.com, “[a] website that publishes anonymous gossip about college students.”¹ In a press release, Attorney General Milgram accused JuicyCampus of potentially “violating the New Jersey Consumer Fraud Act through unconscionable commercial practices and misrepresentations to users.”² Specifically, the Attorney General alleges that while the website’s terms of service “require[s] posters to agree that they will not post content that is abusive, obscene or invasive of another’s privacy” and “tells the public that this offensive content may be removed,” the website itself “apparently lacks tools to report or dispute this material.”³ Less than a year after initiating its investigation, JuicyCampus voluntarily shut down.⁴

This Essay will examine the potential liability of Web 2.0 intermediaries under the New Jersey Consumer Fraud Act⁵ and related consumer fraud statutes, using JuicyCampus as a case study. Part I will provide a brief overview of the relevant statutory provisions of the New Jersey Consumer Fraud Act and case

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¹ Press Release, Office of the Att’y Gen., State Subpoenas Records From JuicyCampus.com As It Investigates the College Gossip Website (Mar. 18, 2008), *available at* <http://www.nj.gov/oag/newsreleases08/pr20080318b.html>.

² *Id.*

³ *Id.*

⁴ Posting of Matt Ivester to Official Juicy Campus Blog, <http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html> (Feb. 5, 2009).

⁵ N.J. STAT. ANN. § 56:8-1 et seq. (2007).

law interpreting it. Part II will succinctly summarize the controversy surrounding the JuicyCampus website and examine its terms of service and other policies. Part III shall argue that not only are JuicyCampus and other Web 2.0 intermediaries immune from liability under such statutes for misrepresentations related to enforcement of their terms of services provisions due to section 230 of the Communications Decency Act, but would be free from liability even in the absence of the section 230 safe harbor. However, it is possible that JuicyCampus and potentially other intermediaries may be found liable under the Act for misrepresentations made to advertising networks such as Google AdSense. The Essay concludes with a discussion of the public policy implications of enforcing the New Jersey Consumer Fraud Act and similar statutes in such a way against Web 2.0 intermediaries.

I. THE NEW JERSEY CONSUMER FRAUD ACT

The New Jersey Consumer Fraud Act (hereinafter “the Act”) has been described by some lawyers as “one of the strongest [c]onsumer statutes in the country.”⁶ The statute reads, in pertinent part,

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.⁷

The Act, originally enacted in 1960 for the purpose of “combat[ing] the increasingly widespread practice of defrauding the

⁶ Posting of Jonathan Rudnick to New Jersey Lemon Lawyer Blog, http://www.newjerseylemonlawlawyerblog.com/2008/02/new_jersey_consumer_fraud_act.html (Feb. 3, 2008).

⁷ N.J. STAT. ANN. § 56:8-2 (2007).

consumer,”⁸ vests the New Jersey Attorney General “with broad powers to investigate, subpoena records, and seek injunctions prohibiting fraudulent conduct and orders of restitution to make whole any person damaged by conduct violating the act.”⁹ In its current form, the Act also allows individual consumers to bring their own private causes of action to obtain treble damages, but only provided that such an individual has suffered an ascertainable loss.¹⁰

The Act itself does not define key terms such as “unconscionable commercial practice.” As a result, it has been up to the courts to determine how such terms are to be applied in practice. The Supreme Court of New Jersey, however, has repeatedly held that the Act, as remedial legislation, must be “liberally construed in favor of protecting consumers.”¹¹ Thus, courts interpreting the statute have consistently favored expansive definitions of all relevant phrases.

II. THE JUICYCAMPUS CONTROVERSY

JuicyCampus.com, a message board “founded on August 1, 2007 with the simple mission of enabling online anonymous free speech on college campuses,”¹² has generated a significant amount of media attention and scrutiny during its relatively short existence. Described as a “rapidly growing gossip site that solicits content with the promise of anonymity,” the message board’s content has over time “devolved from innocuous tales of secret crushes to racist tirades and lurid finger-pointing about drug use and sex, often with the alleged culprit identified by first and last name.”¹³

According to the website’s founder, Matt Ivester, “[t]he idea is that [JuicyCampus] would be a fun place for lighthearted gos-

⁸ *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 14 (1994) (quoting Senate Committee, *Statement to the Senate Bill No. 199* (1960)).

⁹ *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472-73 (1988) (citations omitted).

¹⁰ N.J. STAT. ANN. § 56:8-19 (2007).

¹¹ *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985). See also, *Cox*, 138 N.J. at 16;

¹² JuicyCampus.com, About Us, http://www.juicycampus.com/about_us.php (last visited March 20, 2008).

¹³ Jessica Bennett, *What You Don't Know Can Hurt You*, NEWSWEEK, Dec. 17, 2007, available at <http://www.newsweek.com/id/74322>.

sip. Thinking back to my college days, I can remember some of the ridiculous and hilarious things me and my friends would do, and this would be a place to share that.”¹⁴ When confronted with calls by various school administrators, including those at his alma mater, Duke University, to shut down or more closely moderate his website, Ivester replied,

Like anything that is even remotely controversial, there are always people who demand censorship. However, we believe that JuicyCampus can have a really positive impact on college campuses, as a place for both entertainment and free expression. Frankly, we’re surprised that any college administration would be against the free exchange of ideas.¹⁵

Why have some administrators publicly come out against JuicyCampus? Donna Lisker, Associate Dean for Undergraduate Education at Duke University, stated that she “heard from a number of students who were distressed that their names were on [JuicyCampus],” and believed that the website “allows the worst side of students to appear.”¹⁶ Defamatory postings have been a significant concern, with some messages “call[ing] out professors by name for having inappropriate relations with students,” and other postings “pointing out a student by name, and asking other visitors to speak ill of him or her.”¹⁷ Such defamatory postings have upset some student leaders to the extent that they have actually requested their administrations to outright ban the website from campus. Andy Canales, the leader of Pepperdine University’s student government, which voted 23-5 in favor of banning JuicyCampus from the university’s network,¹⁸ stated that the student government’s

¹⁴ Julia Erlandson, *Campus Gossip Web Sites Satisfy Curious Students While Bringing Up Legal Issues*, DAILY BRUIN, Feb. 4, 2008.

¹⁵ Justin Pope, *Students Fight Back Against Juicy Web Site*, YORK DISPATCH, Feb. 18, 2008.

¹⁶ Andrew Dunn, *Online Message Board Draws Fire*, HERALD-SUN, Dec. 23, 2007, B1.

¹⁷ *Id.*

¹⁸ Other schools have considered taking similar action. See, e.g., Lien Hoang, *CCSC Debates Possible Ban of Gossip Web Site*, COLUM. SPECTATOR, Mar. 3, 2008, available at <http://www.columbiaspectator.com/node/29724>.

vote to ban the website “is an expression from our student body that we don’t want this junk in our community.”¹⁹

JuicyCampus is not the only website to contain potentially defamatory user-submitted content on its message boards. Why, then, has it generated such strong feelings among administrators and students? Unlike other intermediaries, “JuicyCampus seems designed to shield its users from the threat of libel claims” by not maintaining IP logs that could be subpoenaed and used to identify the author of a defamatory posting.²⁰ Furthermore, “JuicyCampus . . . goes further by directing posters to free online services that cloak IP addresses,” and on its blog “implies that it will rebuff” requests to provide user data for “anything short of a public safety query.”²¹ But perhaps most significantly, JuicyCampus explicitly “disavows any obligation to those who are maligned on its pages” and “does not remove content” from its message boards.²²

It is this refusal to remove defamatory and otherwise offensive content that has now resulted in scrutiny from the New Jersey and Connecticut State Attorney Generals’ offices. Connecticut Attorney General Richard Blumenthal, who is conducting an investigation of the website, has stated that “JuicyCampus.com is different from other social-networking sites because of its absolute guarantee of anonymity and its refusal to provide information about people who post hateful, slanderous, abusive and offensive speech.”²³ But does JuicyCampus’s alleged inaction justify liability under state consumer fraud laws? The following section will consider this analysis in the context of the current investigation of JuicyCampus by New Jersey’s Attorney General for potential violations of the New Jersey Consumer Fraud Act.

¹⁹ *Campuses Work to Ban Gossip Web Site: JuicyCampus.com Thrives on Malicious Posts*, GRAND RAPIDS PRESS, Feb. 18, 2008, at A3.

²⁰ Pope, *supra* note 15.

²¹ *Id.*

²² Marc Fisher, *Dorm Gossip Turns Slimy on the Internet*, WASH. POST, Mar. 2, 2008, at C01 (quoting JuicyCampus.com) [internal citations omitted].

²³ Ken Dixon, *JuicyCampus Gossip Site Targeted*, CONN. POST, Mar. 22, 2008.

III. LIABILITY ANALYSIS

The New Jersey Attorney General and Division of Consumer Affairs's investigations of JuicyCampus are based on potential misrepresentations to JuicyCampus's users and third parties, as well as alleged misrepresentations to JuicyCampus's advertisers. This section shall use the JuicyCampus investigation as a case study to examine a Web 2.0 intermediary's potential liability under the Act and similar statutes.

A. Liability for Misrepresentations to Users and Third Parties

Attorney General Milgram has accused JuicyCampus of engaging in "unconscionable commercial practices" in violation of the Act. The term "unconscionable commercial practice," as mentioned earlier, is not explicitly defined in the statute, and courts have generally interpreted it as liberally as possible in a consumer's favor. New Jersey state courts, however, have largely settled on a common definition of the term. According to the New Jersey judiciary's model jury instructions,

An "unconscionable commercial practice" is an activity in the public marketplace, which is basically unfair or unjust, which materially departs from standards of good faith, honesty in fact and fair dealing. To be unconscionable, there should be factual dishonesty and a lack of fair dealing.²⁴

The New Jersey Attorney General has also accused the website of committing "misrepresentation" under the Act. Like "unconscionable commercial practice," the New Jersey judiciary has defined the term "misrepresentation" in its model jury instructions. According to these instructions,

A "misrepresentation" is an untrue statement, which is made about a fact which is important or significant to the sale/advertisement, and is communicated to another person to create the possibility that the other person will be misled. A

²⁴ <http://www.judiciary.state.nj.us/civil/charges/4.43.pdf>.

“misrepresentation” is a statement made to deceive or mislead.²⁵

The following subsections will consider whether JuicyCampus may be found liable for “unconscionable commercial practices” or “misrepresentations” under the Act for its content moderation policies and alleged selective enforcement of its terms of service.

1. Section 230 Preempts Liability Under the Act

JuicyCampus, like other Web 2.0 intermediaries,²⁶ is protected by section 230 of the Communications Decency Act.²⁷ This statute, passed by Congress in 1996 in response to a New York state court decision that found an Internet service provider vicariously liable as a publisher for defamatory statements written by third parties on its message board,²⁸ alters the common law by providing Internet intermediaries with an absolute immunity from civil liability for content authored by third parties.²⁹ In order to preserve the Internet as a vibrant marketplace of ideas, Congress took the additional step of preempting all state or local laws that are inconsistent with section 230.³⁰

Section 230, however, goes beyond immunizing message boards like JuicyCampus from liability for the speech of its users. The statute additionally immunizes Internet intermediaries from any civil liability resulting from “any action voluntarily taken in good faith to restrict access to . . . material that the

²⁵ *Id.* at 6.

²⁶ In general, “Web 2.0 is characterized by user-created content that is prevalent on social networking sites, blogs, and video sharing sites.” Anthony Ciolli, *Joe Camel Meets YouTube: Cigarette Advertising Regulations and User-Generated Marketing*, 39 U. TOL. L. REV. 121, 121 (2007). In other words, “the typical Web 2.0 website specializes in community and allows its users to interact with each other in some way through its service.” Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 179 (2008).

²⁷ 47 U.S.C. § 230 (2006).

²⁸ See *Stratton Oakmont, Inc., v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

²⁹ 47 U.S.C. § 230(c)(1) (2006).

³⁰ The statute states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3) (2006).

provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”³¹ This additional immunity, colloquially referred to as the statute’s “Good Samaritan” provision, also preempts all contradictory state and local laws.³²

Some may question why it was necessary for Congress to include the “Good Samaritan” immunity provision in the section 230 statute. To illustrate the necessity of the “Good Samaritan” provision, one must simply look to the holding of *Stratton Oakmont, Inc., v. Prodigy Services Co.*,³³ the New York state case that spurred passage of section 230 the following year. Under the common law of defamation, an individual who exercises editorial control over a third party’s speech typically becomes a publisher of that speech.³⁴ In *Stratton*, the court applied this common law principle to determine that Prodigy, an Internet service provider which maintained a moderated message board, was a publisher of a defamatory statement on that board even though Prodigy was not the author of the statement and possessed no knowledge of its defamatory contents.³⁵ The court reasoned that, because Prodigy advertised to its members and the general public that it moderates the content of its message boards, and “actively utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste,’” the court found that Prodigy was “clearly making decisions as to content.”³⁶ Even though Prodigy did not always exercise its editorial discretion to remove offensive or inappropriate messages, the court held that Prodigy “uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards,” and therefore Prodigy would be held liable as a publisher of all defamatory statements appearing on the boards.³⁷

³¹ 47 U.S.C. § 230(c)(2)(a) (2006).

³² 47 U.S.C. § 230(e)(3) (2006).

³³ 1995 WL 323710 (N.Y. Sup. Ct. 1995).

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ *Id.* at 4.

³⁷ *Id.*

Though the *Stratton* case was a correct application of the common law as it existed at the time, many social conservatives and others concerned with the proliferation of offensive and inappropriate content on the Internet feared that the decision, if allowed to stand, would lead to many companies operating their message boards and other interactive services as absentee landlords. Republican Congressman Chris Cox, who proposed the “Good Samaritan” provision, argued that his amendment was necessary to “protect [intermediaries] from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve [the indecency] problem.”³⁸ In other words, Congressman Cox and others feared that without an explicit “Good Samaritan” immunity provision, intermediaries would have a strong incentive to never exercise editorial control over third party content under any circumstances, and thus increase the risk that children and others would be exposed to offensive or indecent content.

Section 230’s “Good Samaritan” provision almost certainly would preempt Attorney General Milgram’s potential prosecution of JuicyCampus on the basis that the website purportedly violated New Jersey state law by not honoring its own terms and conditions with respect to its users. Even if the Attorney General’s allegations were all assumed true—that JuicyCampus contractually prohibits users from making certain offensive postings as part of its required terms of service, yet does not remove those offensive postings after they are made—JuicyCampus’s editorial decision to not remove any offensive messages, or only removing some messages but not others, is not in itself grounds for civil liability under current law. JuicyCampus was never under any legal obligation to ban rude, defamatory, racist, or other speech from its message board yet, in order to potentially reduce the incidence of such speech, informed its users that such speech is prohibited and is subject to deletion. This sort of conduct is exactly the kind of activity the “Good Samaritan” provision is intended to protect and thus, if New Jersey’s Attorney General intends to pursue a lawsuit

³⁸ 141 CONG. REC. H8470 (1995).

against JuicyCampus on this basis, it will almost certainly be dismissed on section 230 grounds.

2. JuicyCampus Has Not Misled its Users or the Public

As discussed in the previous sub-section, section 230's "Good Samaritan" provision would almost certainly immunize JuicyCampus and other Web 2.0 intermediaries from liability under the Act for any decisions pertaining to their editorial control over third party message board postings. But even in the absence of its section 230 immunity, it is not likely that JuicyCampus's editorial policies or business practices would be considered "unconscionable commercial practices" or "misrepresentations" under the Act.

For liability to attach to a business owner for "misrepresentations" or "unconscionable commercial practices" under the Act, some sort of untrue statement or factual dishonesty must be present. According to Attorney General Milgram, JuicyCampus has lied to the public by "tell[ing] the public that . . . offensive content may be removed," and then not providing the public with "tools to report or dispute this material."³⁹

But has JuicyCampus actually lied to the public in such a way? The JuicyCampus terms of service does explicitly prohibit users from posting certain types of content, and reads, in pertinent part:

You agree to not use the Site to:

- (a) violate or solicit the violation of any applicable local, state, national or international law;
- (b) infringe the rights of any third party, including but not limited to intellectual property rights and privacy or publicity rights;
- (c) upload, post, email or otherwise transmit any Content that:
 - (1) is unlawful, threatening, abusive, tortious, defamatory, obscene, libelous, or invasive of another's privacy;

³⁹ Office of the Att'y Gen., *supra* note 1.

- (2) consists of instructional information on illegal activities, including, but not limited to, hacking, cracking, and breaking;
 - (3) violates or infringes in any way upon the proprietary rights of others, including, without limitation, copyrighted software, music, photographs, text, videos or artwork;
 - (4) constitutes pornography, or sexual material of an obscene nature or that violates local, state or national laws;
 - (5) is the private information of another such as their addresses, phone number, Social Security number or credit card number;
 - (6) contains software viruses, Trojan horses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer software or hardware or telecommunications equipment; or
 - (7) you do not have a right to upload or post due to contractual or other legal obligation.
- (d) impersonate any person or entity, including, but not limited to, a JuicyCampus employee, forum leader, guide or host, or falsely state or otherwise misrepresent your affiliation with a person or entity;
- (e) forge headers or otherwise manipulate identifiers in order to disguise the origin of any Content transmitted through the Site;
- (f) interfere with or disrupt the Site, computer servers or boards accessible through the Site; and
- (g) disseminate off-topic messages on boards promoting any product, service, web site, board or venture, or promote boards on the Site through unsolicited electronic mail messages to third parties.⁴⁰

⁴⁰ JuicyCampus, Terms & Conditions, http://www.juicycampus.com/terms_and_conditions.php (last visited Mar. 23, 2008).

However, the JuicyCampus terms of service also explains the website's enforcement mechanism for violations of its content policies:

If you use the Site to commit any of the above offenses, JuicyCampus may, at its sole discretion, terminate your password, account (or any part of it) or ability to use the Site, and remove any Content you posted to the Site. If you violate any laws, JuicyCampus may report you to applicable authorities. JuicyCampus will respond to lawful subpoenas.⁴¹

JuicyCampus furthermore states in its terms of service that it does not pre-screen any user-submitted content:

You acknowledge that JuicyCampus does not pre-screen Content, but agree that JuicyCampus shall have the right (but not the obligation) to access, re-arrange, modify and remove or restrict access to any Content on the Site in its sole discretion and without notice or compensation. Without limiting the foregoing, JuicyCampus shall have the right to access and remove or restrict access to any Content that violates this Agreement or that JuicyCampus believes is otherwise objectionable, in its sole discretion.⁴²

As Sam Bayard correctly observes, "it's hard to see how [the JuicyCampus terms of service] is a representation on the part of the website about, well, *anything*."⁴³ While JuicyCampus does, in no uncertain terms, ban defamatory speech, it also makes it clear that enforcement is in JuicyCampus's "sole discretion," and that while it retains the right to enforce its terms of service, it is not in any way obligated to do so. Given these facts, it is difficult to see how JuicyCampus may have engaged in misrepresentations or unconscionable commercial practices under the Act with regard to its users.

Furthermore, it is unclear how JuicyCampus has failed in its purported obligation to provide the public with the tools ne-

⁴¹ *Id.*

⁴² *Id.*

⁴³ Posting of Sam Bayard to Citizen Media Law Project Blog, New Jersey Prosecutors Set Sights on JuicyCampus, Mar. 21, 2008, <http://www.citmedialaw.org/blog/2008/new-jersey-prosecutors-set-sights-juicycampus>.

cessary to report or dispute allegedly defamatory content. Once again, JuicyCampus has not made any representations to the public, through its terms of service or otherwise, that it will make such tools available. However, contrary to Attorney General Milgram's assertions, JuicyCampus has made such tools available. On its frequently asked questions page, JuicyCampus instructs users on what they should do if they encounter a comment on its message board that is not true:

What if I see a comment that just isn't true?

First, you might want to consider whether the comment states a fact or an opinion. Facts can be untrue. Opinions can be stupid, or ignorant, or mean-spirited, but they can't be untrue. And we believe everyone is entitled to their opinion.

Second, if the comment states a fact, rather than an opinion, consider whether there is any possibility that the fact is true. What is the source? Why do you believe it to be incorrect? Is this something about which you have personal knowledge? Sometimes people surprise you.

Third, consider whether the "fact" is meant to be taken as truthful, considering the context. If the "fact" is that Jerry Falwell had sex with his mother in an outhouse, that's obviously meant to be a joke. Parody is protected by the First Amendment.

If you still think the comment is factually false, you should probably give it a big thumbs down down [sic] to start so that people know you disagree. And you can also reply with your thoughts on the subject and additional information – maybe even something that disproves it.

Finally, remember that you are reading a web site run by people you don't know, containing comments made by people you don't know, concerning events which may or may not have occurred. You should take everything you read with a large grain of salt.⁴⁴

⁴⁴ JuicyCampus, Frequently Asked Questions, <http://www.juicycampus.com/faqs.php> (last visited Mar. 23, 2008).

In other words, JuicyCampus clearly recommends that individuals who encounter potentially untrue statements first consider the possibility that the statement is actually true or an opinion or parody and, then, if still believed to be false, use the message board itself as the mechanism for disputing the accuracy of the content. Additionally, JuicyCampus provides its contact information, and invites individuals to send electronic or postal mail if they have any feedback or questions.⁴⁵

To summarize, based on the information available, it is highly unlikely that JuicyCampus has violated the Act with respect to any alleged misrepresentations to its users. JuicyCampus has not given its users the impression that it has assumed a duty to prescreen or otherwise moderate postings on its message board, since it has explicitly stated multiple times on its website, including in its terms of service, that it always retains the sole discretion to remove or alter content and is under no obligation to actually enforce its terms of service. Contrary to Attorney General Milgram's assertions, JuicyCampus has also told individuals that the appropriate mechanism for responding to factually untrue statements is to use the JuicyCampus message board to explain that the earlier statement is untrue. Finally—and most importantly—any action against JuicyCampus under the Act is preempted under the “Good Samaritan” provision of section 230 of the Communications Decency Act, thus preventing JuicyCampus from being held liable for any violations of the Act with respect to potential misrepresentations to its users regarding its content moderation policies even if it has acted wrongly.

B. Liability for Misrepresentations to Advertising Networks

In addition to the allegations that JuicyCampus has misled its users and third parties, Attorney General Milgram has accused the website of misrepresenting itself to Google AdSense, AdBrite, and potentially other online advertising networks.⁴⁶ Though the Attorney General and the Division of Consumer Af-

⁴⁵ JuicyCampus, Contact Us, http://www.juicycampus.com/contact_us.php (last visited Mar. 23, 2008).

⁴⁶ Office of the Att'y Gen., *supra* note 1.

fairs have not elaborated on this potential cause of action in their statements to the media, it is likely that section 230 would not shield JuicyCampus from liability for misrepresentations made to these advertising agencies.

1. Why Liability May Attach

Online advertising networks, such as AdBrite and Google AdSense, allow website owners to easily monetize their properties without having to go through the trouble of soliciting advertisers themselves. Such networks essentially serve as intermediaries between websites and those who wish to advertise on the Internet: website owners apply for representation and, if their applications are approved, the networks will automatically begin to serve advertisements on those websites that will typically vary based on each website's content.⁴⁷ In exchange for acting as an intermediary between advertisers and website owners, the advertising network will receive a commission, believed to be in the range of forty to sixty percent.⁴⁸

But not all websites are eligible for such representation. Like their offline counterparts, online advertising agencies will only agree to represent publishers that meet their required terms and conditions. Each advertising network has its own terms and conditions, and policies may differ significantly from one network to another. For example, while large networks such as Google AdSense typically have no minimum traffic requirement for representation, smaller networks will often only represent websites that exceed a certain minimum number of monthly page views.⁴⁹

⁴⁷ For more information on the AdSense and AdBrite programs, see Google AdSense, <http://www.google.com/adsense> (last visited Mar. 22, 2008); AdBrite, How AdBrite Works, <http://www.AdBrite.com/mb/howitworks.php> (last visited Mar. 22, 2008).

⁴⁸ Though advertising networks, including AdSense, often do not release their precise commission—perhaps because they vary—some search engine marketing specialists speculate that the commission is in this range. See, e.g., Chris Beasley, *Introducing Google AdSense*, SITEPOINT, June 25, 2003, <http://www.sitepoint.com/article/introducing-google-adsense>.

⁴⁹ For instance, Global Interactive, a relatively small online advertising network, requires that all websites it represents "[h]ave a minimum of 3,000 impressions per month, and an active user base." Global Interactive, Site Requirements,

Though advertising networks may differ as to some requirements, virtually all networks exclude certain types of websites from representation based on their content. Google AdSense, for instance, prohibits websites from displaying its ads on websites with the following types of content:

- Pornography, adult or mature content
- Violent content
- Content related to racial intolerance or advocacy against any individual, group or organization
- Excessive profanity
- Hacking/cracking content
- Gambling or casino-related content
- Illicit drugs and drug paraphernalia content
- Sales of beer or hard alcohol
- Sales of tobacco or tobacco-related products
- Sales of prescription drugs
- Sales of weapons or ammunition (e.g. firearms, firearm components, fighting knives, stun guns)
- Sales of products that are replicas or imitations of designer goods
- Sales or distribution of coursework or student essays
- Content regarding programs which compensate users for clicking ads or offers, performing searches, surfing websites or reading emails
- Any other content that is illegal, promotes illegal activity or infringes on the legal rights of others.⁵⁰

http://www.globalinteractive.com/publishers_site_requirements.html (last visited Mar. 22, 2008).

⁵⁰ Google AdSense, Google AdSense Program Policies, <https://www.google.com/adsense/support/bin/answer.py?answer=48182&sourceid=aso&subid=ww-ww-et->

AdBrite prohibits similar websites as AdSense, explicitly banning:

- Any pornographic material, adult material, or mature content including thinly censored nudity. Due to the risk of adult content, we do not allow image hosts or free web hosting services.
- Any offers for illegal activities, products or services.
- Promotion of fake documents, copied material, or paper mills.
- Promotion of drugs, or any related paraphernalia.
- Promotion of excessive profanity or violence
- Promotion of discrimination or infringes on the legal rights of others.
- Promotion or any attempt to profit from human tragedy or suffering that lacks any social, artistic, or political value. This includes any content that may be deemed inappropriate or insensitive to victims of natural disasters or human tragedies.
- Promotion of incentives for users or third-party beneficiaries for online activities, but not limited to, completing offers, performing searches, surfing websites, reading emails, completing surveys, clicking on ads, or any activity that artificially enhances website/advertiser metrics.
- Promotion of illegitimate programs and offers, such as ponzi schemes or high yield investments.
- Content or site construction intended to deceive or mislead for purposes of increasing traffic or clicks.
- Sales or offers that contain certain weapons, alcohol, tobacco, or any related paraphernalia.
- User submitted content that is not moderated.
- Little or no original content. This includes, but is not limited to:

◦**Scraped content:** Sites with content taken from high-quality sources or “Free Article” sites. These are often template or cookie cutter sites.

◦**Auto-generated content:** Sites with programmatically generated content. These sites often have random content that is confusing or nonsensical to a site visitor.

◦**Doorway sites:** Sites with content designed to increase search engine rank, with little content for an actual site visitor.

◦**Made for ad sites:** Sites that primarily consists of only advertisements do not constitute content for a landing page.

◦**Login to view any content:** Sites with landing pages with only a login or registration form.

◦**Thin affiliate sites:** These sites collect pay-per-click (PPC) revenue by sending visitors to the sites of affiliate programs, while providing little or no value-added content or service to the user. These sites usually have no original content and may be cookie-cutter sites or templates with no unique content.

◦**Site under construction:** Sites that are blank, under construction, page with raw coding/incorrect coding, or take too long respond.⁵¹

Before submitting an application requesting representation, website owners are required to certify to both AdBrite and Google AdSense that they have read their respective program policies and agree to adhere to those terms.⁵²

As mentioned in Attorney General Milgram’s press release announcing the investigation, JuicyCampus was once a participant in both the AdBrite and AdSense programs, and her office

⁵¹ AdBrite, Publisher Acceptable Use Policy, <http://help.AdBrite.com/index.php?action=artikel&cat=2&id=208&artlang=en> (last visited Apr. 15, 2010).

⁵² See AdBrite, Website Owners: Sign Up to Earn Money, https://www.AdBrite.com/mb/publisher_landing_page.php (last visited Mar. 23, 2008); Google AdSense, Welcome to AdSense, <https://www.google.com/adsense/g-app-single-1> (last visited Mar. 23, 2008).

has sent a subpoena to AdBrite “requesting information about the business relationship between AdBrite and JuicyCampus.com in order to determine how JuicyCampus.com represented its operation to AdBrite.”⁵³ In addition, the Attorney General has sent a letter to Google AdSense “inquir[ing] about the company’s prior business relationship with JuicyCampus.com.”⁵⁴

Given these facts, there is a good possibility that New Jersey’s Attorney General could establish a *prima facie* case against JuicyCampus under the state’s consumer fraud statute. Provided that JuicyCampus represented itself as being in compliance with AdBrite and AdSense’s program policies, yet was aware that it had not been in compliance, one could argue that JuicyCampus engaged in misrepresentation, intentionally misleading the advertising networks as to the site’s content in order to enter into a business relationship with them that would not have occurred otherwise.

2. JuicyCampus’s Potential Defenses

But while Attorney General Milgram may be able to establish a *prima facie* case of misrepresentation against JuicyCampus and prosecute the website’s owners, there is no guarantee that liability will actually attach.

Perhaps one of the strongest defenses available to JuicyCampus is that its alleged misrepresentation was not material to the transaction, since AdBrite and AdSense assented to JuicyCampus’s content. Both AdBrite and AdSense pre-screen all applications for their respective programs to ensure that the websites that will display their ads are in compliance with their program policies. The website approval process is not merely a technical formality—AdSense, for instance, has rejected such a large number of websites during the application process that it has created a “Before You Apply to AdSense” page that discusses “a few common pitfalls” that webmasters should avoid in

⁵³ Office of the Att’y Gen., *supra* note 1.

⁵⁴ *Id.*

order to make sure that their applications are approved the first time around.⁵⁵

Since both advertising networks pre-screen all applications to ensure compliance with their program policies *before* ads are allowed to appear on those websites, one can assume—provided that AdSense and AdBrite followed their own stated policies—that agents of both networks were aware of the content on the JuicyCampus website, yet decided to accept JuicyCampus's application anyway. By accepting JuicyCampus's application after a site review—which, given the design of the JuicyCampus website, would have surely uncovered the website's content—AdSense and AdBrite demonstrated that either they agreed that JuicyCampus was in compliance with their policies (in which case JuicyCampus did not misrepresent itself) or felt that any misrepresentations JuicyCampus made about its content were immaterial to the transaction (which would preclude liability under the Act even if JuicyCampus had misrepresented the content of its message boards). In any event, the site review aspect of the AdSense/AdBrite application process provides JuicyCampus with a strong defense against any claim that it has violated the Act.

3. Policy Considerations

As the above subsection demonstrates, it remains an open question as to whether JuicyCampus can be found liable under a state consumer fraud statute for alleged misrepresentations made to its advertising agencies. However, even if JuicyCampus's potential defenses did not apply or were not persuasive, public policy considerations work against applying the statute to the website. Perhaps the strongest policy argument against holding an Internet intermediary liable for purported misrepresentations to Internet advertising agencies is that in such situations neither the agencies nor advertisers have actually suffered any damages nor has the intermediary received a windfall.⁵⁶ It

⁵⁵ Google AdSense Blog, *Before You Apply to AdSense*, <http://adsense.blogspot.com/2007/09/before-you-apply-to-adsense.html> (Sept. 25, 2007, 10:35 AM PDT).

⁵⁶ See SearchEngineWatch.com, *AdSense Publisher Sues Google – And Wins*, Mar. 6, 2009, <http://blog.searchenginewatch.com/090306-120235> (explaining AdSense's prac-

is well established that public policy strongly disfavors allowing a party to recover damages for alleged fraud when no party has actually suffered damages as a result of the fraud.⁵⁷ Given this context, it is unclear how allowing New Jersey to pursue Juicy-Campus or another intermediary under such a theory could be justified.

IV. CONCLUDING REMARKS

To the extent New Jersey or any other state wishes to pursue an Internet intermediary under a consumer fraud statute on the basis of purported misrepresentations the intermediary has made to its users or to the general public regarding its content moderation policies, such an action is clearly and unambiguously preempted under section 230 of the Communications Decency Act. However, to the extent the State grounds its action on misrepresentations to advertising networks, liability may attach to the intermediary despite section 230. Nevertheless, given the review processes employed by these advertising networks, as well as public policy considerations, it is unlikely that such actions, even if not preempted, will or should succeed.

tice of withholding funds when an account is terminated and refunding those funds to advertisers).

⁵⁷ See, e.g., *Orient Handel v. United States Fid. & Guar. Co.*, 237 Cal. Rptr. 667, 696 (Cal. Ct. App. 1987) (holding that insurer may not recover for insured's purported fraud when insurer did not suffer any damages).



EMPLOYEE FIDUCIARY DUTIES: ONE SIZE DOES NOT FIT ALL

*Leslie Larkin Cooney**

This article examines the law surrounding the fiduciary duties owed by non-officer employees to their employers and the remedies imposed for a breach of those duties. It is the author's contention that applying the same agency principles to all employees regardless of their level of power or ability to exercise discretion or affect the employer's interests generates an uncalled for advantage to the employer.¹

Employment law in the United States has evolved from the English law of master and servant, and agency is defined as the fiduciary relationship arising when a principal manifests assent to an agent that the agent will act subject to the principal's control, on the principal's behalf and the agent consents to act.² While agency encompasses a range of circumstances and relationships, the Restatement of Agency (Third) indicates its elements are present in the employer-employee relationship.³ "The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to inte-

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¹ This premise applies only to non-officer employees. Officers and other employees occupying positions of confidence and trust should be subject to the broad application of agency's fiduciary duties and applicable remedies for breach.

² RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Id.* See *Walton v. United States*, 80 Fed. Cl. 251, 273-74 (Fed. Cl. 2008).

³ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006); Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1051 (2007). "Thus, agents for purposes of common law agency include lawyers, real estate brokers, stock brokers, officers of legal entities of all sorts, and employees." *Id.* See *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1085 (9th Cir. 2003); *Judah v. Reiner*, 744 A.2d 1037, 1039-40 & n.5 (D.C. 2000). *But see* *Haas v. Caster*, 66 N.W. 2d 878, 880 (Iowa 1954) (noting that an employee is not always an agent for the employer); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 315 (Iowa 1966) (stating there is a very fine line between agent and employee).

ract with parties external to the employer's organization."⁴ Since agency is a fiduciary relationship, if employees are agents,⁵ then all employees have a fiduciary relationship with their employer.⁶ As agents of the employers, all employees owe broad fiduciary duties to their employers.⁷ The scope of the duties defined by this relationship is outlined in the Restatement of Agency (Third).

The Restatement of Agency (Third) expresses a general fiduciary standard and separates an agent's duties into duties of loyalty and duties of performance.⁸ This general fiduciary standard requires an employee to act loyally for the employer's benefit in all matters connected with the relationship.⁹ An agent's specific duties of loyalty restrict an employee from acquiring any material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the employer or otherwise through the use of the employee's posi-

⁴ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

⁵ *Nationwide Mut. Ins. Co., v. Darden*, 503 U.S. 318, 322-23 (1992); See Richard J. Hunter, Jr., *An "Insiders" Guide to the Legal Liability of Sports Contest Officials*, 15 MARQ. SPORTS L. REV. 369, 398 (2005).

⁶ H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 165-66 (1877) (reprinted in R.H. HELMHOLZ, BERNARD D. REAMS, JR., HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE 18 (W.S. Hein 1981)). Wood's Treatise states:

On the part of the servant, there is an implied obligation to enter the master's service and serve him diligently and faithfully, to obey all his reasonable commands, treat him respectfully, conduct himself morally in his master's family, and to perform the duties incident to his employment honestly, with ordinary care, and due regard to his master's interest and business.

Id. at 166.

⁷ Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process Is Effected*, 2006 DUKE L. & TECH REV. 2, 11 (2006).

⁸ RESTATEMENT (THIRD) OF AGENCY §§ 8.01-8.12 (2006). See *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510 (Tex. Ct. App. 2003).

⁹ RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." *Id.* The duty of loyalty derives from the basic obligation of faithful service found in English master and servant law and has been a part of our earliest common law. William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 31 (2001) (citing Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture*, 13-50-1870, at 169 (1991)). See *Ray Mart Inc. v. Stock Bldg. Supply of Tex. LP*, No. 07-50609, 2008 WL 4809471, at *6 (5th Cir. Nov. 5, 2008); *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86, 95 (D.D.C. 2009).

tion¹⁰ and restricts the employee from dealing as an adverse party or on behalf of one in any transaction connected with the employment.¹¹ The Restatement of Agency (Third) also obliges employees to refrain from competing with the employer and from acting for or assisting competitors.¹² If, for the employee's own purposes or the purposes of a third party, an employee uses the employer's property or communicates confidential information, the employee violates an agent's duty of loyalty.¹³ An employer may consent to conduct that would otherwise be disloyal, but an employee must act in good faith in obtaining this consent, must disclose all material facts and must otherwise deal fairly with the employer.¹⁴ An employee may take actions dur-

¹⁰ RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006). "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position." *Id.* See *Abetter*, 113 S.W.3d at 510; *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002).

¹¹ RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006). "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship." *Id.* See *Abetter*, 113 S.W.3d at 510; *Johnson*, 73 S.W.3d at 200; *Television Events & Mktg. Inc. v. Amcon Distrib. Co.*, 526 F. Supp. 2d 1118, 1126–28 (D. Haw. 2007).

¹² RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006). "Throughout the duration of the an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors." *Id.* "During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship." *Id.* See *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1209–10 (10th Cir. 2007) (stating that an employee's failure to disclose his ownership stake in a subcontractor company hired by the principal resulted in the violation of the employee's fiduciary duty).

¹³ RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006). "An agent has a duty (1) not to use property of the principal for the agent's own purposes or those of a third party; and, (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party." *Id.* See *Synergetics, Inc. v. Hurst*, 477 F.3d 949, 959 (8th Cir. 2007) (stating that a former employees' use of confidential trade secret information to design competitive products violated their duty of loyalty to their former employers).

¹⁴ RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006).

(1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that

(a) in obtaining the principal's consent, the agent

(i) acts in good faith,

(ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are al-

ing employment to prepare for competition after termination of employment, provided such activity is not otherwise wrongful.¹⁵ An employee who acts for more than one employer in a transaction between employers has a duty to act in good faith and deal fairly with each employer, disclosing to each that the employee works for the other as well as all other facts that would reasonably affect either employer.¹⁶

An agent's duties of performance require an employee to comply with the express and implied terms of any employment contract,¹⁷ comply with all lawful instructions,¹⁸ and act with

ready known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal; and

(b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

(2) An agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal,

(b) to disclose to each principal

(i) the fact that the agent acts for the other principal or principals, and

(ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.

Id. See United Teachers Assocs., Ins. Co. v. MacKeen & Bailey Inc., 99 F.3d 645, 650 (5th Cir. 1996) (holding that an actuary giving advice, with permission, to a competing insurance company during negotiations of a purchase of that particular company, which resulted in the failure of negotiations, violated the actuaries fiduciary duty to the insurance company with which he was contracted).

¹⁵ RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006). *See* Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065, 1071–72 (Ind. Ct. App. 2007) (stating that an attorney planning to leave his firm did not breach his fiduciary duty by questioning other employees about their desire, if any, to leave the firm and work for his new firm in the future); Nat'l Rejectors, Inc. v. Trieman, 409 S.W.2d 1, 26–28 (Mo. 1966) (stating that employees who organized, planned and incorporated a new competing company while still employed did not breach their fiduciary duties).

¹⁶ RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006). *See* Television Events & Mktg., Inc. v. Amcon Distrib. Co., 526 F. Supp. 2d 1118, 1133–34 (D. Haw. 2007).

¹⁷ RESTATEMENT (THIRD) OF AGENCY § 8.07 (2006). "An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal." *Id. See* Hendricks Prop. Mgmt. Corp. v. Birchwood Props. Ltd. P'ship, 741 N.W.2d 461, 465–66 (N.D. 2007).

the care, competence and diligence exercised by employees similarly situated.¹⁹ The employee must act reasonably and avoid actions likely to damage the employer²⁰ and must act only within the scope of the employee's actual authority.²¹ The employee has the duty to provide information material to the employment and its functions.²² Duties of performance relate objectively to each employee's specific obligations and provide standards specific to that particular employment relationship. For example, although the overarching duties of performance are the same whether the employee is an entry-level stock clerk, a mid-level

¹⁸ RESTATEMENT (THIRD) OF AGENCY § 8.09(2) (2006). "An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal." *Id.* See *Appleby v. Kewanee Oil Co.*, 279 F.2d 334, (10th Cir. 1960) (reaffirming that an agent must obey any lawful instructions given by the principal).

¹⁹ RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006).

Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.

Id. See *Carrier v. McLlarky*, 693 A.2d 76, 78 (N.H. 1997) ("Agents have a duty to conduct the affairs of the principal with a certain level of diligence, skill, and competence.").

²⁰ RESTATEMENT (THIRD) OF AGENCY § 8.10 (2006). "An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise." *Id.* See *McGarry v. Saint Anthony of Padua Roman Catholic Church*, 704 A.2d 1353, 1357–58 (N.J. Super. Ct. App. Div. 1998) (stating that even if an agent's actions are satisfactory, an agent's conduct that sheds improper light or can damage the principal breaches an agent's fiduciary duty).

²¹ RESTATEMENT (THIRD) OF AGENCY § 8.09(1) (2006). "An agent has a duty to take action only within the scope of the agent's actual authority." *Id.* See *Baranski v. Fifteen Unknown Agents of ATF*, 195 F. Supp. 2d 862, 866 (W.D. Ky. 2002) (noting that executing and serving search warrants is within the scope of duty for ATF agents).

²² RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006).

An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when

(1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and

(2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

Id. See *United States v. Stein*, 463 F. Supp. 2d 459, 461–62 (S.D.N.Y. 2006); *Sotheby's Int'l Realty, Inc. v. Black*, 472 F. Supp. 2d 481, 486–87 (S.D.N.Y. 2006).

sales manager, or an upper-level executive vice president, it is easy to distinguish among the requirements which would satisfy the fulfillment of such duties at each level, and it is obvious that the requirements become more onerous as the levels of employment rise.²³ This is not so easily distinguishable or obvious when one looks at employees' fiduciary duties of loyalty that serve functions distinct from those of performance.²⁴ Nonetheless, disloyalty by employees is likely to fall into two basic categories: the first stemming from a conflict between the employer's interests and those of the employee, and the second stemming from conflicting interests from multiple or successive employers.²⁵ The majority of cases involving alleged breaches of the duty of loyalty by employees fall into the first category due to the sheer fact that most employees will be acting for only one employer²⁶—unlike other non-employee agents who more often work for multiple principals. Of course, as the American workforce becomes more mobile, and this mobility is likely to grow during today's recessionary times, the amount of breaches of employee loyalty arising from conflicting interests from multiple employers will most certainly increase.²⁷ Moreover, the reach of

²³ Interestingly, although at-will employment does not bind an employee to performance, the duty of loyalty has been found to attach once performance begins. See *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 599 (Iowa 1999).

²⁴ DeMott, *supra* note 3, at 1057–58 (generalizing that the duty of loyalty acts as “an exclusively subsidiary function” in that, regardless of the agent's completion of other duties, the agent's actions can still be scrutinized as to their loyalty throughout the process of completing those duties). See *Bee Load Ltd. v. British Broad.*, No. CV03-417, 2005 WL 3338923, at *2 (Me. Super. Ct. Sept. 20, 2005) (noting that “the duty of loyalty and the duty of care are distinct elements found in a fiduciary relationship”); *Meyers v. Sudfeld*, No. Civ. A.05-2970, 2006 WL 401855, at *6 (E.D. Pa. Feb. 21, 2006) (stating that “a claim of breach of the fiduciary duty of loyalty represents a distinct cause of action . . . which implicates a duty of care”).

²⁵ DeMott, *supra* note 3, at 1054 (citing Matthew Conaglen, *The Nature and Function of Fiduciary Loyalty*, 121 L.Q.R. 452, 465 (2005)).

²⁶ *Fatland v. Quaker State Corp.*, 62 F.3d 1070 (8th Cir. 1995).

²⁷ See generally Jill Rubery, Jill Earnshaw & Mick Marchington, *Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships*, in *FRAGMENTING WORK: BLURRING ORGANIZATIONAL BOUNDARIES AND DISORDERING HIERARCHIES* at 64 (Mick Marchington et al. eds., Oxford: Oxford University Press, 2005) (“Where employees of one organization work in environments open to pressure and influence from other employers, the relevance of key notions of . . . loyalty . . . are called into question.”). See also Alfred W. Blumrosen & Ruth G. Blumrosen, *First Statistical Report on Intentional Job Discrimination Against Women*, 25 WOMEN'S RTS. L. REP. 63, 69 (2003) (“[I]n the present era, where job security is no longer so common

the duty encompasses any employee conduct that is inconsistent with the employer's interests and, therefore, it arguably extends to harmful speech,²⁸ insubordination,²⁹ neglect,³⁰ disruption of employee/employer relations,³¹ or discrediting the employer's name,³² product³³ or reputation.³⁴

Courts sometimes indicate that the employee accused of breaching his or her fiduciary duties was an officer, executive, or manager and the use of such facts would seem to attach some

and employee "loyalty" has been undermined by changes in the employment relationship, an increasing proportion of employees are likely to be mobile."). But see, Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y. 105, 119 (2003) (positing employers in the Silicon Valley accept employee disclosure of trade secrets and do not sue former employers because the employers remember how they began their own careers).

²⁸ When one is fired because of information appearing on one's website or in a blog, the employee has been "dooced." Laura DiBiase, *To Blog or Not to Blog?*, AM. BANKR. INST. J., Nov. 24, 2005, at 32. Some states have enacted legislation making it harder for employees to be terminated for off-duty conduct. See COLO. REV. STAT. ANN. § 24-34-402.5 (West 1990) (prohibiting an employer from terminating "any employee due to that employee's engaging in any lawful activity off the premises of the employer during non-working hours"); N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2003) (prohibiting employer discipline or termination for an employee's "legal recreational activities outside work hours"); N.D. CENT. CODE § 14-02.4-03 (2005) (prohibiting discrimination based on an employee's lawful off-duty activities). See Aaron Kirkland, *"You Got Fired? On Your Day Off?!" Challenging Termination of Employees for Personal Blogging Practices*, 75 UMKC L. REV. 545 (2006) (calling for a federal approach to protect off-duty activities which are unrelated to job performance).

²⁹ *Grigsby v. Kane*, 250 F. Supp. 2d 453, 455 (M.D. Pa. 2003) (finding two former attorneys for Pennsylvania's Bureau of Professional Licensing and Occupational Affairs were properly terminated for speaking out against a new quota system used to determine "which healthcare professionals should be prosecuted for violating the law").

³⁰ *Long v. Ohio Dep't of Job & Family Servs.*, 907 N.E.2d 373, 381 (Ohio Ct. App. 2009) (stating that standards of employee conduct for employees of the Dep't are violated by "incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of public, neglect of duty, acts of misfeasance or nonfeasance").

³¹ See generally *Alberti v. County of Nassau*, 393 F. Supp. 2d 151 (E.D.N.Y. 2005) (finding an employee's political affiliation may lead to disruption of employee/employer relations when the employment concerns policymaking and political connections).

³² *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007) (holding an employee can violate his/her duty by discrediting the employer's name through posting messages on an internet blog).

³³ *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458 (D. Colo. 1997) (finding an airline employee violated a duty not to discredit an employer's product by sending a letter to a newspaper criticizing the airline).

³⁴ *Tory A. Weigand, Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON BAR J. 6, 7 (Sept./Oct. 1998).

importance to the level of an employee's position when adjudicating fiduciary duties.³⁵ For example, when applying Illinois law, a federal district court pointed to the fact that the employee was highly paid, had access to the employer's confidential information such as customer lists, and had authority to place orders and sell and distribute products before concluding that the employee was liable for a breach of a fiduciary duty.³⁶ Conversely, the court in *Dalton v. Camp*³⁷ did not discuss whether a former manager owed the fiduciary duties of an agent to his employer and whether the alleged conduct formed a basis for a breach of fiduciary duties.³⁸ Instead, the court implicitly established the presumption that a fiduciary relationship *does not exist* between employer and employee.³⁹ The court further clarified that it did not sanction an independent action for breach of duty of loyalty and stated that the manager's disloyalty was only relevant as part of the employer's defense in an action for wrongful termination.⁴⁰

³⁵ *E.g.*, *Beverly Hills Concepts, Inc. v. Schatz & Schatz*, 717 A. 2d 724, 730 (Conn. 1998) (holding that, unlike the firm's partner, the junior associate did not have the special trust with the client to conclude that there is a fiduciary duty); *Sun Life Assurance Co. of Can. v. Coury*, 838 F. Supp. 586 (S.D. Fla. 1993); *Pride Mobility Prods. Corp. v. Dylewski*, No. 3:08-cv-0231, 2009 WL 249356, at *18 (M.D. Pa. 2009) ("[D]efendants were shareholders, employees, directors, and managers of the plaintiff corporation and clearly owed the plaintiff corporation the fiduciary duties commensurate with their respective positions."); *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 716 (6th Cir. 2005) (finding that the district court improperly granted summary judgment to employee defendants *solely* because it did not need to consider the employees' "alleged positions of trust and access to confidential information" on the grounds that salespeople cannot owe fiduciary duties to an employer); *Talenburst, Inc. v. Collabera, Inc.*, 567 F. Supp. 2d 261, 265-67 (D. Mass. 2008) (stating that Massachusetts law of employee-employer fiduciary duties depends on an evaluation of the whether the employee held "positions of trust and confidence"); *c.f.* *Chelsea Industries, Inc. v. Gaffney*, 449 N.E.2d 320, 326 (1983) (stating "Employees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer.").

³⁶ *Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc.*, 420 F. Supp. 2d. 866, 871 (N.D. Ill. 2006). The court granted injunctive relief to an employer when a former employee violated the restrictive covenants of his employment agreement and breached his fiduciary duty by soliciting customers and other employees. *Id.*

³⁷ 548 S.E. 2d 704 (N.C. 2001).

³⁸ See *id.* at 708; Bret L. Grebe, *Fidelity at the Workplace: The Two-faced Nature of the Duty of Loyalty under Dalton v. Camp*, 80 N.C. L. REV. 1815, 1826 (2002).

³⁹ Bret L. Grebe, *supra* note 38, at 1821.

⁴⁰ *Dalton*, 548 S.E.2d at 709. The former employee had responsibilities "not unlike those of employees in other businesses and can hardly be construed as uniquely posi-

To the extent that the holding in *Food Lion, Inc.* . . . can be read to sanction an independent action . . . we conclude that the federal district court incorrectly interpreted our state case law [A]n examination of our state's case law fails to reveal support for the . . . contention that this Court would broaden the scope of fiduciary duty to include food-counter clerks employed by a grocery store chain.⁴¹

Rather than obliquely relying on facts that show any employee being charged with fiduciary duties is in actuality an officer of the employer or implicitly establishing a presumption against the fiduciary status of lower-level employees, a much more direct approach would be advisable. Direct development of the law in this manner would not only provide clarity and a more rational analytical approach, but it would also provide better guidance to employers, employees, and those providing advice to them concerning the fiduciary obligations of all levels of employees.

This direct approach is apparent in Wisconsin common law. The Supreme Court of Wisconsin established an initial threshold to be met when the claim is for an employee's breach of the duty of loyalty.⁴² The threshold question is whether the employee has an agency relationship;⁴³ if the employee is a "key employee" then the duty of loyalty is present.⁴⁴ The determination of whether one is a key employee depends on the nature of the employment duties.⁴⁵ In this particular case, the court looked to the fact that the employee was the "Procure-

tioning him to exercise dominion." *Id. Accord* Reichhold Chemicals, Inc. v. Goel, 555 S.E.2d 281 (N.C. App. 2001).

⁴¹ *Dalton*, 548 S.E.2d at 709. The federal district court held a cause of action for breach of fiduciary duty had been stated against supermarket employers who were actually television reporters who did not disclose their true identities in securing employment and later disclosed food mishandling via videotaping in the workplace. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1224 (M.D.N.C. 1996).

⁴² *Burbank Grease Servs., L.L.C. v. Sokolowski*, 717 N.W.2d 781 (Wis. 2006).

⁴³ *Burg v. Miniature Precision Components, Inc.*, 330 N.W.2d 192 (Wis. 1983).

⁴⁴ *Burbank*, 717 N.W.2d at 303–04 (citing *Burg v. Miniature Precision Components, Inc.* 330 N.W.2d 192 (Wis. 1983); *Aon Risk Servs., Inc. v. Liebenstein*, 710 N.W.2d 175 (2006)). See also *Marshfield Machine Corp. v. Martin*, 630 N.W.2d 275 (Wis. Ct. App. 2001); *Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.*, 557 N.W.2d 835, 838 (Wis. Ct. App. 1996).

⁴⁵ *Burbank*, 717 N.W.2d at 796 (citing *Aon*, 710 N.W.2d at 175).

ment/Territory manager" and stood in a confidential relationship regarding trade secrets and other confidential data provided to him in this particular management position.⁴⁶ The details of the employee's responsibilities gave rise to the fiduciary duties of an agent and created the duty of loyalty and the duty not to disclose information material to the agency relationship.⁴⁷ Canadian employment law recognizes that while all employees owe a basic contractual duty of loyalty to their employers, only certain employees, based upon their duties and responsibilities, owe the more exacting fiduciary duties to employers.⁴⁸

Only a few states statutorily define the agency relationship, one of which is the State of Georgia.⁴⁹ Georgia statutes define the agency relationship as arising "wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf."⁵⁰ In addition, Georgia courts have held that an employer-employee relationship does not typically create an agency relationship unless the employee is vested with authority to act on behalf of the employer.⁵¹ Fiduciary obligations such as a duty of loyalty do not extend to low level employees in Georgia.⁵²

The scope of the duty of loyalty an employee owes to an employer in New Jersey varies with the nature of their relationship.⁵³ Employees performing low-level tasks owe a lesser duty than those occupying a position of trust and confidence.⁵⁴ In

⁴⁶ *Id.* at 797.

⁴⁷ *Id.* at 797-98.

⁴⁸ James C. Oakley, *Employee Duty of Loyalty -- A Canadian Perspective*, 20 COMP. LAB. L. & POL'Y J. 185, 190 (1999).

⁴⁹ ALA. CODE § 8-2-1 (2008); CAL. CIV. CODE § 2307 (West 2009); GA. CODE ANN. § 10-6-1 (2008); MONT. CODE ANN. § 28-10-201 (2008); N.D. CENT. CODE § 3-01-06 (2008); S.D. CODIFIED LAWS § 59-2-2 (2008).

⁵⁰ GA. CODE ANN. § 10-6-1 (2008).

⁵¹ See *Atlanta Mkt. Ctr. Mgmt. Co. v. McLane*, 503 S.E.2d 278 (Ga. 1998); see also *Physician Specialists in Anesthesia, P.C. v. Wildmon*, 521 S.E.2d 358, 360 (Ga. Ct. App. 1999).

⁵² See *Se. Consultants, Inc. v. McCrary Eng'g Corp.*, 273 S.E.2d 112 (Ga. 1980). See *Physician Specialists in Anesthesia*, 521 S.E.2d at 360-61 (noting that an employee does not have fiduciary duties when the agency relationship simply involves an employee who has no authority to create obligations on behalf of the employer and no right or access to confidential and corporate records).

⁵³ *Cameco, Inc. v. Gedicke*, 724 A.2d 783, 789 (N.J. 1999).

⁵⁴ *Id.* The court cogently explained:

Cameco, Inc. v. Gedicke,⁵⁵ a salaried employee, while still employed, established a business to supplement his income without disclosing this to his employer.⁵⁶ The court found the employee's fiduciary duty may have been breached even though the supplemental business did not directly compete with the employer's business simply because the new business may have assisted the employer's competitors.⁵⁷ The court remanded for a finding as to whether the specific conduct did amount to a breach of duty of loyalty.⁵⁸ The court did advise that the "egregiousness of the employee's conduct may affect the determination of" whether a breach had occurred and indicated the facts surrounding the employment itself also shaped the outcome:⁵⁹

Facts suggesting that [the employee] did not breach his duty of loyalty are that he was a low- or mid-level salaried employee; that during his employment, [he] was not subject to any contractual limitation preventing him from establishing an outside business; that he did not cause [the employer] to lose any customers, sales, potential sales, or profits; and that he did not compete directly with [the employer] or render substantial assistance to any of its competitors.⁶⁰

A reality of contemporary life is that many families will consist of two wage earners, one wage earner with two jobs, or both. For some employees, particularly those earning low or modest incomes, second sources of income are an economic necessity. For them, a second job or "moonlighting" is the only way to make ends meet. Conversely, employers need the assurance that employees will not disserve them by furthering their own interests or those of competitors at the employers' expense.

Id.

⁵⁵ *Id.*

⁵⁶ *Id.* at 786-87.

⁵⁷ *Id.* at 788. The trial court, however, had dismissed the employer's complaint and found the employer's testimony was "exaggerated" and vindictive, and concluded that the employee's actions were not detrimental to the employer, the employee's new business did not compete directly with the employer, and the employer had not suffered any damages. *Id.* at 787.

⁵⁸ *Id.* at 792.

⁵⁹ *Id.* at 789.

⁶⁰ *Id.* at 792. The court further opined that the fact finder could also determine that the employee's assistance to any competitor was so insubstantial or that any competition between the alleged competitors and the employer was so insubstantial that the employer did not breach any duty. *Id.*

A somewhat similar approach to the threshold has developed in other jurisdictions. The Tenth Circuit Court of Appeals interpreted Texas law to mean that agency relationships, and the fiduciary duties that attach, are not automatically assumed merely based on an employee-employer relationship.⁶¹ Instead, the court looked at the particular facts of the employment circumstances and used them in analyzing whether an agency relationship had been created.⁶² While courts frequently state an employee owes his or her employer a fiduciary duty, some courts will not recognize an independent claim for a breach of a duty of loyalty unless there is an underlying fiduciary relationship beyond a mere employment situation.⁶³ When the employee in *Rash v. J.V. Intermediate, Ltd.*⁶⁴ sued his former employer for fraud and breach of contract, the former employer counterclaimed alleging breach of employment contract, breach of fiduciary duty, and breach of the duty of loyalty.⁶⁵ The trial court granted the employee's motion for a judgment as a matter of law on the counterclaim for breach of fiduciary duty because no special relationship of trust and confidence existed between the employee and the employer.⁶⁶ The issues of breach of contract and breach of the duty of loyalty did go to the jury with the jury finding for the employee as to breach of contract, but granting the former employer's counterclaim damages due to the employee's breach of the duty of loyalty.⁶⁷ The appellate court, however, found that the trial court had erred because the facts

⁶¹ *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201 (10th Cir. 2007).

⁶² *Id.* at 1207-09.

⁶³ *Compare* *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020 (Colo. Ct. App. 1993) (stating that fiduciary duties extend to more than corporate officers and high level employees) *and* *Cenla Physical Therapy & Rehab. Agency, Inc. v. Lavergne*, 657 So.2d 175, 176-77 (La. Ct. App. 1995) (noting that even "minor-role-playing employees" owe fiduciary duties to employers) *with* *Beverly Hills Concepts, Inc. v. Schatz & Schatz*, 717 A.2d 724, 729 (Conn. 1998) *and* *Eaton Corp. v. Giere*, 971 F.2d 136, 141 (8th Cir. 1992) (stating that a cause of action for breach of the duty of loyalty is encompassed in a claim for a breach of fiduciary duty).

⁶⁴ 498 F.3d 1201 (10th Cir. 2007).

⁶⁵ *Id.* at 1205-06.

⁶⁶ *Id.* at 1208.

⁶⁷ *Id.* At trial, the employee had requested \$564,993 in damages and the jury awarded him \$444,933 while the former employer requested \$143,000 on its counterclaim for breach of duty of loyalty and the jury awarded \$71,500 on the counterclaim. *Id.* at 1206.

of this employment not only gave rise to an agency relationship but also that the undisputed evidence showed the employee had breached the fiduciary duty.⁶⁸ In applying Texas law, the court recognized that employees are not necessarily agents with accompanying fiduciary duties and opined that fiduciary duties, while imposed on some business relationships because of “special trust,”⁶⁹ are not part of “every relationship involving a high degree of trust and confidence.”⁷⁰ In determining as a matter of law that a fiduciary relationship, and therefore fiduciary duties, did indeed exist in this case, the court examined the employee’s specific duties.⁷¹ The employee had the ability to negotiate contracts with authority over subcontracts and he had a written employment contract in which he not only agreed to perform the duties of an agent, but also consented to devote “full work time and efforts to the business and affairs” of his employer.⁷² Since these duties rose to the level of a “special trust,” the court held that the employee had breached his fiduciary duty by failing to

⁶⁸ *Id.* The Tenth Circuit Court of Appeals remanded for a jury determination of the damages on the breach of fiduciary duty claim and for a judicial determination of the remedy of forfeiture. *Id.* at 1215–16.

⁶⁹ *Id.* at 1207 (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002)).

⁷⁰ *Id.* at 1207 (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176–77 (Tex. 1997)). Texas courts consider it “impossible to give a definition of the term” fiduciary duties in a way “comprehensive enough to cover all cases.” *Johnson*, 73 S.W.3d at 199.

⁷¹ *Rash*, 498 F.3d at 1208. The court pointed to three other cases where Texas courts have found employees to be agents and fiduciaries. *Id.* (citing *Johnson*, 73 S.W.3d at 202–03 (holding that a law firm’s associate had a fiduciary duty when the associate “specifically undertook to act as [an] agent in obtaining an agreement” to represent helicopter crash victims); *Kinzbach Tool Co., v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 (Tex. 1942) (holding that a fiduciary duty existed where an employee “permitted his employer to consummate a contract where[] it bought for \$25,000 that which he . . . knew might be bought for \$20,000,” failed to disclose this fact to his employer, and did not disclose “that he was acting for the opposite side in the deal for a profit to himself”); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 185–87 (Tex. App. 2005) (holding that a fiduciary duty existed when the employee was “hired to serve as a project manager and on-site superintendent for the project” whose specific responsibilities included “soliciting bids, setting the scope of work for each subcontractor, reviewing the bids, letting the contracts, and overseeing people working on the project”)).

⁷² *Rash*, 498 F.3d at 1208–09. The employee had sole management responsibilities of a branch; he was charged with finding facilities to operate the business, hiring and training employees, gathering tools and equipment, promoting the venture, soliciting and receiving bids, and their invoices, setting customer rates, and tracking all costs. *Id.* at 1208.

disclose his interest in another company that competed and contracted with the employer.⁷³

The court in *Rash* carefully segregated an employee's "common law" duty of loyalty from an agent's fiduciary duty and stated:

[T]he fiduciary relationship establishes a distinct and separate obligation than the duty of loyalty to an employer described above. The fiduciary duty exists because of the "peculiar" trust between the employee-agent and his employer-principal. . . . Thus, the bonds created by a fiduciary relationship are stronger and the obligations are correspondingly more rigorous than those ascribed to the duty of loyalty.⁷⁴

Not only did the court distinguish between the duty of loyalty, which every employee owes to her employer, and the fiduciary duty owed by an agent, but the court also stated that an agent's fiduciary duty may be "more wide-ranging" and the employee's actions could constitute a "more egregious violation under a fiduciary theory than under a loyalty theory."⁷⁵

It is when we look to the damages to be applied to a particular case that these distinctions become critical. For a breach of the duty of loyalty, typically an employer has the option of recovering either the profit earned by the disloyal employee or the profit the employer would have earned had the employee not been disloyal.⁷⁶ The remedy of disgorgement⁷⁷ is not only to compensate for the wrong but to act as a disincentive to prevent such wrongs from occurring.⁷⁸ The concepts of restitution and

⁷³ *Id.* at 1209-11.

⁷⁴ *Id.* at 1211.

⁷⁵ *Id.* Since the employer had argued the breach of fiduciary duty claim was an alternative, not a supplement, to the duty of loyalty claim, the court held that a jury determination on the damages for breach of fiduciary duty would have to be offset by the previously awarded amount on the breach of duty of loyalty claim. *Id.* at 1212.

⁷⁶ See *Gomez v. Bicknell*, 756 N.Y.S.2d 209, 214 (2002).

⁷⁷ See generally *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 186-87 (Tex. Ct. App. 2005).

⁷⁸ *Gomez*, 756 N.Y.S.2d at 113-14 (citing *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969)). See *Millbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994) (stating that a principal could recover for breach of fiduciary duty without proving "but for" causation or proximate cause).

unjust enrichment⁷⁹ also support the legal basis for liability⁸⁰ even though the employer is not able to establish that the employee's breach of the duty of loyalty caused a loss to the employer.⁸¹ Some courts, however, require a strict causal connection between the breach of fiduciary duty and the amount of damages claimed.⁸²

When a strict causal connection is required, or when a disloyal employee has not realized any gain, or when it is difficult to prove that any harm to a principal resulted from such disloyalty, forfeiture may be the remedy utilized by a court.⁸³ Forfeiture not only has a valuable deterrent effect because it signals that some adverse consequences will inure to any disloyal employee,⁸⁴ but it also enables the employer to have a remedy at a much lower cost than protracted litigation.⁸⁵

Forfeiture is based on two propositions: (1) the principal is considered not to have received what he bargained for if the agent breaches his fiduciary duties while representing the principal, and (2) fee forfeiture is designed to discourage agents from being disloyal to their principal or "to protect relationships of trust by discouraging agents' disloyalty." The re-

⁷⁹ See generally *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994) (defining the concepts of restitution and unjust enrichment).

⁸⁰ "[A] plaintiff suing for breach of fiduciary duty can recover damages for mental anguish" in some jurisdictions. Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 848 (2006) (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266-67 (Tex. App. 1991)).

⁸¹ RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1) (2006).

⁸² *Augat, Inc. v. Aegis, Inc.*, 631 N.E.2d 995, 999 (Mass. 1994).

⁸³ *Katalinic v. Bd. of Trustees of Mun. Employees', Officers', & Officials' Annuity & Benefit Fund*, 898 N.E.2d 243, 248 (Ill. App. 1st 2008) (stating that forfeiture is sufficient so long as there is a causal connection with the employment); *Musico v. Champion Credit Corp.*, 764 F.2d 102, 113 (2d Cir. 1985) (noting the trend in New York law is toward the Restatement position of apportioning forfeitures of a disloyal agent's compensation in specified circumstances).

⁸⁴ RESTATEMENT (THIRD) OF AGENCY (THIRD) § 8.01 cmt. d(2) (2006).

⁸⁵ *Id.* Employers can also pursue appropriate remedies against employees for misappropriation of trade secrets, but proving such has been so difficult, expensive and unpredictable that employers have found it prohibitive to use except in extreme cases. Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y. 105, 117-18 (2003).

medy of forfeiture "applies generally in agency relationships."⁸⁶

The facts of the employment relationship and the extent of the employee's actions should affect the applicability and the extent of any forfeiture.⁸⁷ Forfeiture is generally an equitable remedy, comparable to a constructive trust.⁸⁸ Generally, a former employee may be required to repay all compensation⁸⁹ received during the period of her disloyalty.⁹⁰ Some states do not permit set-off for properly performed services during the period of disloyalty,⁹¹ while others limit forfeiture or apportion fees

⁸⁶ *Rash v. J. V. Intermediate, Ltd.*, 498 F.3d 1201, 1212 (10th Cir. 2007) (quoting *Burrow v. Acre*, 997 S.W.2d 229, 237-38, 242-43 (Tex. 1999)) (citations omitted).

⁸⁷ *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591, 596-97 (S.C. 1999) (stating that in assessing compensation in forfeiture, "the nature of the employment relationship, the nature and extent of the employee's services and the breach of duty, the loss or expense caused to the employer by the breach of duty, and the value to the employer of the services properly rendered by the employee" should be taken into consideration). See also *Hartford Elevator, Inc. v. Lauer*, 289 N.W.2d 280, 287 (Wis. 1980) (stating that the court must focus on the particular circumstances of a case rather than adopting a rigid rule requiring forfeiture of all compensation during disloyalty); *Jet Courier Serv. v. Mulei*, 771 P.2d 486, 497 (Colo. 1989) (stating that the court should consider the nature of the employment relationship, the impact or potential impact of the employee's actions on the employer's operations, and the benefit received by the employer during the period of disloyalty).

⁸⁸ Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 848 (2006) (citing *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999)).

⁸⁹ See *Foley v. Am. Elec. Power*, 425 F. Supp. 2d 863, 875-76 (S.D. Ohio 2006) (deferring that compensation plan benefits constitute forfeitable employee compensation); *Phansaalkar v. Anderson Weinroth & Co., L.P.*, 344 F.3d 184, 210-11 (2d Cir. 2003) (stating that employer offered investment opportunity and its realized benefits are subject to forfeiture by a disloyal employee).

⁹⁰ *G.K. Alan Assoc., Inc. v. Lazazari*, 840 N.Y.S.2d 378, 384-85 (App. Div. 2007) (noting that federal courts typically hold forfeiture to only compensation due in relation to the disloyal action or actions); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 865 N.Y.S.2d 14, 23-24 (App. Div. 2008) (stating that in terms of attorney disloyalty in the attorney-client relationship, a separate hearing is required to fully establish disloyalty for forfeiture purposes); *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 153 (2d Cir. 1999) (noting that under New York law employees are obliged to forfeit salary during the period of disloyalty).

⁹¹ *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 505 (Colo. 1989) (Mullarkey, J., concurring) ("Set-offs against wage claims are disfavored because of the inherent economic inequity between the employer and employee."); *ABC Trans Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc.*, 413 N.E.2d 1299, 1315 (Ill. App. 1980) (stating that while forfeiture is proper during periods of disloyalty, "[t]he agent retains compensation rightfully earned before the breach, for specific periods").

under certain conditions.⁹² Complete forfeiture is imposed in Massachusetts unless the disloyal conduct is not egregious and the employee has established that his services were valuable beyond the parameters of his disloyal conduct,⁹³ yet little attention actually has been paid to the egregiousness factor by the courts.⁹⁴ Instead, the baseline proposition has remained one of complete forfeiture by a disloyal employee.⁹⁵ The approach to forfeiture in New Jersey, however, is somewhat different.⁹⁶ The court in *Cameco, Inc. v. Gedicke* outlined four considerations that would affect whether forfeiture was an appropriate remedy for breach of an employee's duty.⁹⁷ First, the court looked at the existence of contractual provisions, and whether such provisions permitted or specifically prohibited certain behavior.⁹⁸ Second, the court determined whether the employer knew of or agreed to the employee's conduct, with the court allotting specific interest to any employee disclosures to the employer.⁹⁹ Third, the court examined the status of the employee and her relationship to the employer.¹⁰⁰ Finally, the court looked at the nature of the employee's second source of income.¹⁰¹ The usefulness of these four considerations is somewhat undercut by the court's recognition that the guidelines require reference to specific facts, which, due

⁹² *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 148-49 (2d Cir. 1998) (applying a rule of apportionment under New York law to the fees related to the specific items of work for which the agent had acted disloyally); *Bessman v. Bessman*, 520 P.2d 1210, 1219 (Kan. 1974) (stating that a minor breach affecting a single transaction will not result in forfeiture of the compensation attributable to other transactions).

⁹³ Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON B.J., Sept.-Oct. 1998, at 6, 7.

⁹⁴ *Id.* at 21-22 (citing *Boston Children's Heart Found., Inc. v. Nadal-Ginard*, 73 F.3d 429, 435 (1st Cir. 1996)).

⁹⁵ *Id.*

⁹⁶ *See, e.g., Simulations Sys. Tech., Inc. v. Oldham*, 634 A.2d 1034 (N.J. App. 1993); *Joseph Toker, Inc. v. Cohen*, 169 A.2d 838 (N.J. App. 1961).

⁹⁷ *Cameco, Inc. v. Gedicke*, 724 A.2d 783, 791 (N.J. 1999). The court looked to whether the employee's conduct was "willful and deliberate" as well as the "egregiousness" of the actions. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* This third consideration would appear to mirror the analysis concerning whether a fiduciary relationship even existed to justify the application of any doctrine of forfeiture. "An officer, director, or key executive, for example, has a higher duty than an employee working on a production line." *Id.*

¹⁰¹ *Id.* at 791.

to an inadequate record, were lacking in this particular case.¹⁰² While the court in *Rash v. J.V. Intermediate, Ltd.* did not list similar considerations for the applicability of the remedy of forfeiture, it did state that forfeiture was a proper equitable remedy that applied only to *clear and serious* violations of fiduciary duties and thus remanded for a judicial determination of the propriety of the remedy of forfeiture.¹⁰³ Before this judicial determination could be made, the court, upon remand, submitted fact questions to the jury concerning the timing of the employee's breach of fiduciary duty, the willfulness of the employee's acts, and the damages caused thereby.¹⁰⁴ Because of this, it appears as though the court believes these facts will determine if the violations were clear and serious.

A disjunction would seem to occur between the agency concept making the employment relationship one of agency and the fiduciary duties and the remedies for breach of those duties as applied to lower-level employees. At best, applying the lens of agency law to all employment situations requires most jurisdictions to engage in an overlapping analysis in first trying to decide if the specific facts give rise to a breach of fiduciary duty by an employee, and then again when adjudicating the appropriate remedy. An officer or an employee who possesses significant discretion and authority in her position should have higher duties of loyalty imposed by law than those of the lower-level employee. The law of agency would appear to be best situated to properly define these distinctions. While the concept of a broad duty of loyalty owed to every employer is an enticing one, if an employer is uniquely vulnerable to an employee who holds discretion or authority, the employer has it within its power to take

¹⁰² *Id.* at 792. John A. Boyle, *Moonlighting—Employee Assistance to an Employer's Competitor, Including Formation of a Competing Business, May Breach the Employee's Duty of Loyalty and Require Forfeiture of Compensation Paid to the Employee During Periods of Disloyalty*, 30 SETON HALL L. REV. 673, 681 (2000).

¹⁰³ *Rash v. J. V. Intermediate, Ltd.*, 498 F.3d 1201, 1212, 1216 (10th Cir. 2003). Upon remand, the jury's involvement in the equitable remedy of forfeiture is limited to resolving contested fact issues. *See Rash v. J.V. Intermediate, Ltd.*, No. 04-CV-681-FHM, 2008 WL 2568305, at *1 (N.D. Okla. June 20, 2008).

¹⁰⁴ *Rash*, 498 F.3d at 1212, 1216.

additional measures for adequate protection.¹⁰⁵ The lower-level employee, however, has no such ability to insulate himself from the overbroad application of fiduciary duties. The sweeping categorization of every employee as an agent without permitting distinctions for those employees who are not “key”¹⁰⁶ or who do not hold a position of “special trust”¹⁰⁷ creates the very real possibility that low-level employees may suffer from the harsh forfeiture remedies without any allowance made for work performed during a period outside of the perceived breach. While total forfeiture may make sense as a punitive or deterrent measure in the case of an officer or confidential employee, it unfairly tips the scale in favor of the employer when it over broadly includes all employees. The concept of employee fiduciary duties should be more carefully defined and not just applied to all.

¹⁰⁵ Employers should seek protections as part of an employment contract, confidentiality agreement, trade secrets, and the like. Both employer and employee would be on notice as to the terms and have an opportunity for a bargained for exchange.

¹⁰⁶ *Burbank Grease Serv., LLC v. Sokolowski*, 717 N.W.2d. 781, 796 (Wis. 2006).

¹⁰⁷ *Rash*, 498 F.3d at 1207.



ANTECEDENT LAW: THE LAW OF PEOPLE-MAKING

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INTRODUCTION: THE GREAT ASSUMPTION

The term “law,” at least as it is used in the social sciences, is not easy to define. Modern legal theorists, like H.L.A. Hart, have spent a lot of time showing that.¹ But, while the sufficient conditions for law to obtain are debated, in most cases, there are at least two necessary conditions: there must first exist some group of persons, amongst whom the law can exist, and law must influence the relations of those persons, most often their behavior towards one another.² Certainly older understandings of law, such as John Austin’s notion of norm-subjects under orders enforced by threats from the sovereign,³ paint a mental picture of people whose behavior is also susceptible to influence. And, although more nuanced, modern concepts of law like

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¹ See H.L.A. HART, *THE CONCEPT OF LAW* 5, 16 (2d ed. 1994).

² See, e.g., THOMAS AQUINAS, *The Treatise On Law Q. 90: The Essence of Law*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 44 (Sigmund ed. & trans., 1988) (describing law as “a rule or measure of action by which one is led to action or restrained from action”); SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 39 (Garland 1978) (defining law as rules of human conduct or action); E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* 275 (1954) (describing law’s primary function in its universal aspect as setting up limitations on rights, duties, powers, etc.); HERMANN KANTOROWICZ, *THE DEFINITION OF LAW* 12 (1958) (describing law as “a body of rules aiming at the prevention or the orderly settlement of conflicts”); HANS Kelsen, *PURE THEORY OF LAW* 31 (Max Knight trans., 1967) (identifying law as regarding human behavior); Andrei Marmor, *The Nature of Law*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring 2010), available at <http://plato.stanford.edu/entries/lawphil-nature/> (noting that law “purports to guide human behavior, giving rise to reasons for action”). Even this simple description does not fully capture all instances of law, i.e., law between nations, or law between humans and animals, but we can say that it captures most instances of law.

³ See HART, *supra* note 1, at 16.

Hart's central set of elements, or Ronald Dworkin's treatment of law as an interpretive concept, also suggest this image of people who are susceptible to law's influence as they relate to one another.⁴ Thus, in our common understanding of law, the bare minimum that emerges is a mental picture of people standing in relation to and influenced in their relation towards one another.

But this bare concept of law fails to account for exactly how the people entered the picture, i.e., the particular system of laws that facilitate entry into the polity. Nor does it explain why these people are all susceptible to the influence of the thing we call law. It is as if the persons to whom law is addressed have simply appeared, carrying with them whatever attributes or qualities they need to respond to law. In our mental picture, they exist *ex ante*. It is as if the law has simply arrived at a party with the guests already assembled, each well prepared, or having the necessary attributes, to assume whatever role the law gives them.

However, while as a historic matter people probably did pre-date law, as a conceptual matter they need not. Any system of laws or norms will also determine, whether by prescription or omission, the circumstances in which persons enter that system, and will thereby play a role in creating them. For example, when states decide to give a tax credit to promote childbearing or charge a fee to discourage it, to legalize or ban abortion, to promote or prevent certain forms of immigration, or to do nothing at all with regard to immigration, states make choices that determine the presence of persons within their borders.

⁴ See HART, *supra* note 1, at 79-123, 155; RONALD DWORKIN, LAW'S EMPIRE 86 (1986); see also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 260, 276 (2000); JOSEPH RAZ, PRACTICAL REASON AND NORMS 144 (1999); Persons being susceptible to laws, as is discussed in notes 36-46 *infra* and the accompanying text, means more than something as simple as one's body being susceptible to arrest, or even merely being responsive to physical sanction. See, e.g., Jeremy Waldron, *All We Like Sheep*, 12 CAN. J.L. & JURIS. 169, 176 (1999) ("If they abide by them only to the extent (say) that cats and dogs do—i.e., only to the extent that their physical behavior is actually forced into conformity by leashes, chains, muzzles, kicks, etc.—then they may not be regarded as a part of the population among whom the legal system in question exists."). Susceptibility might be thought of as a spectrum that starts with something like a "disposition" to obey the law, which runs towards becoming the "angels" that Raz refers to as the requisite norm-subjects for a sanctionless legal system. See FINNIS, *supra* at 267; RAZ, *supra* at 159.

And, when a state determines the circumstances in which persons enter the polity, it is also inevitably determining something about how those persons will relate to the polity's laws, or what may be called his or her susceptibility to law. If a given polity has a written, as opposed to an oral, system of laws, but does nothing to ensure those entering it know how to read, the polity—in "creating" its new members—is determining something about how those persons will relate to its laws.

There is thus a body or form of law that exists before, or antecedent to, our most bare concept of law. But, we do not now divide between the antecedent law that creates (or makes present) persons *qua* norm-subjects and the law that then directs them as such. It is as if law is a key that we presume fits the lock, i.e., the person *qua* norm-subject. But we do not notice that the law plays a special antecedent role in creating the locks and in shaping them as such.

Perhaps we can explain the omission in this way: it could be that our bare concept of law leaves the creation of persons *qua* norm-subjects to other disciplines and instead focuses on those persons' subsequent arrangement and constraint. Certainly political (as opposed to legal) philosophers have been more explicit about the importance of focusing not just on extant members of the polity, but also on those entering it. Addressing the creation of new members in a polity, Rousseau said:

Again, attention must be given to the greater or lesser fertility of women, to what the country can offer that is more or less favorable to the population, to the number of people the legislator can hope to bring together through his institutions. Thus, the legislator should not base his judgment on what he sees but on what he foresees. And he should dwell less upon the present state of the population as upon the state it should naturally attain.⁵

Perhaps people-making is a matter best left to politics, or economics, rather than law. But, admittedly, Hart does briefly touch upon the issue, though unlike Rousseau he focuses more

⁵ JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 45 (Donald A. Cress ed. & trans., Hackett 1987) (1762).

on the susceptibility side of the coin. He said in *The Concept of Law*:

Thus, the still young sciences of psychology and sociology may discover or may even have discovered that, unless certain physical, psychological, or economic conditions are satisfied, e.g. unless young children are fed and nurtured in certain ways within the family, no system of laws or code of morals can be established, or that only those laws can function successfully which conform to a certain type.⁶

Could it be that looking at these matters from a legal perspective, as opposed to a political or economic one, leads to different results? Should law account for the creation and susceptibility of people, or leave that matter to other disciplines, so that the law simply takes whatever people political and economic systems produce? It may be that the most basic notion of law itself will lead us to think different things about people-making, about the creation of persons in our basic mental picture of the legal system, than our basic notions of power or of economics would. That is, making norm-subjects may be a different matter than making economic-subjects or power-subjects. Legal systems may demand special types of persons; persons different than those required for political or economic systems. The various conceptions of law that exist may all tell us something in common about what we need to do to make norm-subjects, perhaps something more than the unsurprising point that the law ought to make people that are responsive to it.

We might even go so far as to say that a system made up of economic-subjects and/or power-subjects, as opposed to norm-subjects (or what we may all legal-subjects), that is, a system whose members are responsive to political and/or economic stimuli rather than norms, is not a legal system at all. Citizens in a legal system would be legal persons, primarily or exclusively responsive to the stimuli of the norms alone, rather than political or economic persons responsive to the coercive stimulus of the stick (power) or the incentivizing and disincentivizing stimulus of the carrot (economics), so to speak. The dispositive test

⁶ See HART, *supra* note 1, at 189.

for such a system would literally be compliance with the legal norms without any associated coercive sanctions, or economic costs or benefits.

But it could also be that our bare concept of law leaves the creation of subjects aside, to other disciplines, because there is something heretical in seeing the law in this way.⁷ The law does not create people and give them attributes. Only a divine creator can do that. The creator makes people and gives each his/her qualities and the law must simply take these people and their qualities as it finds them.

In contrast with that view, and with the view that people-making is to be left to other disciplines like politics or economics, this Article is directly concerned with law as it creates members of a legal system, with the law that *first* sets the irreversible stage on which our traditional concept of law *then* acts. This “antecedent law” is simply a body, or form, of law. It is law that meets the necessary and sufficient condition of determining the entry of new persons into the polity, and through that, the susceptibility of those persons to law itself.

The form of antecedent law is new. But it works by grouping together existing forms of law, like laws determining procreation, immigration, and education,⁸ based on their shared role in determining persons’ susceptibility to law through their entry into the polity.

Much like contract or tort law, antecedent law is itself not a conception of law,⁹ nor is it a descriptive theory of law’s norma-

⁷ The notion of antecedent law may be in tension with some views of liberal government that see the state and its laws as having no role in creating citizens, though that point is not addressed here. See, e.g., Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1597 (2008) (“Liberalism assumes that the citizens exist prior to the state, whether in fact or by hypothesis, and that they create the state to advance their own interests.”).

⁸ For a discussion of the role of education law in people-making, see *infra* Part I.

⁹ Antecedent law is not a candidate for changing the essential concept of law described here because it uses the more basic concepts of humans and behavior. Rather, it is a candidate for a form of law. Antecedent law is related, but not identical, to the concept of biopolitics. See, e.g., Jedediah Purdy, *The New Biopolitics: Autonomy, Demography, and Nationhood*, 2006 BYU L. REV. 889, 894 (“Biopolitics comprises the relationship between individuals’ control over their bodies and the power the political community may exercise over them: both the demands it may make (that they bear children, that they fight and die) and the prohibitions it may impose (no abortions, no second children).”).

tivity.¹⁰ It is much cruder than these things. It simply groups many existing forms of law together, making them sub-forms, much like the way immigration law groups together sub-forms like naturalization law and asylum law. Antecedent law focuses our attention on the processes that create the most basic state of legal affairs: people within a given legal system,¹¹ with their varying degrees of susceptibility to its laws.

The argument involves three steps: the first step, Part I of this Article, defines antecedent law and describes what the form does that our existing forms of law do not. Part II is more prescriptive, advocating for a particular content for the form, or substantive antecedent law norms. Specifically, Part II identifies a state interest in “valuable autonomy” (hereinafter “autonomy”), which, following Joseph Raz, may be understood as the presence and active pursuit of morally valuable options in life.¹²

¹⁰ This article distinguishes antecedent law from the influential and empirically based behavioral theories of the law, which focus on *how* the law influences (if at all) our beliefs and behaviors. They range from a material incentive based law and economics approach to highly nuanced theories that explain how law shapes societal norms or accounts for cultural and moral cognition. See, e.g., Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, in 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL JUDGMENT AND DECISION MAKING 101 (Daniel Bartels et al. eds., 2009). In contrast, antecedent law focuses on *whatever it is about the law* that creates (makes present) persons in particular circumstances, and persons *qua* the subjects of law—the lock into which the key of law is inserted. See *supra* note 6 and accompanying text. Put simply, behavioral theories determine how the law influences behavior, but antecedent law is only concerned with how the law influences the very specific behaviors that constitute people-making.

¹¹ This brief introductory article will not discuss the role federalism plays in antecedent law, though how antecedent law applies in overlapping polities is an obvious question at this point.

¹² The term “valuable autonomy” is taken from Raz and his perfectionist view of liberalism. Raz finds that “[a]utonomy is valuable only if exercised in pursuit of the good.” JOSEPH RAZ, *THE MORALITY OF FREEDOM* 381 (1986). This article understands the concept as freedom to make and act on one’s subjective choices, but within the bounds of some objective morality. Do we find equal value in one’s freedom to feed a starving animal as we find in one’s freedom to kick that same animal down the street? Arguably we do not. Raz’s autonomy is also a kind of positive freedom, where the state does not make its citizens free by simply ignoring them, but must provide a range of morally valuable options (i.e., the option to become a doctor, but not an alcoholic; to be literate, but not illiterate; to care for animals, but not abuse them) and ensure that each citizen has the “deliberative and volitional capacities” (or civic qualities) to make use of the choices. See Leslie Green, *Un-American Liberalism: Raz’s ‘Morality of Freedom,’* 38 U. TORONTO L.J. 317, 324-25 (1988). This paternalistic view of freedom rejects moral relativism and subjectivism and finds that we value freedom only once we have certain capacities, and then only because it lets us do things that are good, things we objectively value.

It then argues that antecedent law can enable a state to maximize autonomy by regulating the creation and susceptibility to law (or what might be called civic quality) of its citizens, rather than focusing merely on those citizens' subsequent arrangement and constraint. Lastly, Part III explores three counterarguments that are likely to be made against antecedent law and the content proposed in this article.

What is the value of such a reductive approach, of dividing law in this simple way, between law and pre-law? How does this add to the existing literature? It adds to the literature in four ways:

First, there is a logical distinction, not made before, between the law that creates persons, and in doing so makes them subject to its influence, and the law that subsequently directs them. The notion of antecedent law, or law before law, seeks to account for this distinction. It seeks to fill a gap in our discipline that makes it more static than it has to be by addressing the behavior that determines whether persons will exist and whether they need to be, or can be, subject to coordination and constraint.¹³

Second, antecedent law may add to the concept of the rule of law, and even become part of the *desiderata* for it.¹⁴ It seems inconceivable that a state can establish a legal system consistent with the rule of law without taking special regard of the actual creation of the persons within it, both of the number created as well as their susceptibility to its laws. Is the system simply the set of laws themselves, irrespective of the quantity and civic quality of the people to whom they are addressed?

Third, antecedent law, as a form of law, may help distinguish law from other disciplines like economics and politics. As will be discussed more fully below, a legal system—one that uses norms to guide behavior—may call for a different constituency, both in number and in kind, than a system that is merely

¹³ This article does not use "static" in the sense that Hart uses the term, to refer to the slow evolution of primary rules. See HART, *supra* note 1, at 92. Rather, it refers to the meaning Rousseau suggests. See *supra* note 5 and accompanying text.

¹⁴ See FINNIS, *supra* note 4, at 270.

economic or political, i.e., one that uses material incentives and disincentives, or coercion, rather than norms, to guide behavior.

Finally, in a less theoretical and much more doctrinal sense, antecedent law may also help us explain what is arguably a very specialized level of state interest, speaking in purely U.S. constitutional law parlance. The Supreme Court uses extreme rhetoric when referring to the state's compelling interest in laws and policies that will determine the nature of future citizens, often using superlatives across a range of cases.¹⁵ Scholars like Erwin Chemerinsky cite the state's interest in child welfare, along with national security, as clear examples of things in which the state has a compelling interest.¹⁶ By grouping together laws around this shared characteristic, or their role in shaping the future constituency of the polity, we might prioritize it as a category, beyond the rhetoric.¹⁷ In other words, we might more clearly discuss, determine, and understand what common, and perhaps unique, level of constitutional interest a state has in things like procreation, immigration, and education. We might distinguish between the state's interest in law that creates persons and law that then directs them.

The abortion debate in the United States today is emblematic of the law and antecedent law distinction. The opposing points of the debate arise from conflicting interests in liberty, equality, and in protecting the sanctity of life. The traditional

¹⁵ See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 790 (1982) (Rehnquist, J., dissenting) ("Few could doubt that the most valuable resource of a self-governing society is its population of children."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (referring to education as "perhaps the most important function of state and local governments"); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) ("[D]emocratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies.").

¹⁶ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 767 (2002).

¹⁷ Antecedent law appears in perhaps its most crystallized form in the no-growth ordinances of small polities (where the affects of both the number and the civic qualities of each citizen are more keenly felt). For a discussion of what those ordinances protect and why, see generally Tom Pierce, Comment, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability*, 19 U. HAW. L. REV. 93 (1997).

view of law is focused on regulating the competing interests of existing persons in the polity, focused on the mental picture of people who now exist in it. But abortion, from an antecedent law perspective, is perhaps most interesting for how it determines the conditions in which prospective citizens will or will not enter the polity.¹⁸ It literally involves the physical remaking of the polity debating it. Could our shared and overriding interest in that issue push these other interests into the background and also provide common ground for compromise, perhaps because there are widely-shared and objective standards for the conditions under which persons should and should not enter the polity?

Similarly, constitutional law today focuses on the meaning of a specific document—the Constitution. But, from an antecedent law perspective, the Constitution, in regulating abortion for example, re-determines the *constituents* of the polity. Could it also be seen as *constitutional* in that sense? And could seeing it as such lead us to understand it and the controversies it mediates in different ways?

Focusing on the law's role in these matters and giving that focus a rubric drags into the open something that is otherwise left out of view by the traditional concept of law. Antecedent law is like a mill that, without being named and examined, operates quietly in the background, generating the constituent elements of law. Naming it allows us to avoid focusing myopically on the law itself rather than the growing number of persons it pertains to, and upon whose susceptibility to norms that law is based.

This Article will not systematically discuss how determining the entry of new members into the polity, and as such the polity's size, relates to susceptibility, though some themes may emerge. First, because the state must expend certain resources to ensure new persons will be susceptible to its laws, and resources are scarce, there may be a tension between growth and susceptibility. Second, because the total resources of any polity

¹⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (White, J., concurring) ("There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").

are scarce, the number of new entrants may have to be limited to avoid the type of excessive resource competition that leads to chaos, or the converse of susceptibility to law. Third, because each new entrant will dilute the role all other members play in creating the norms (e.g., through their vote), there may also be a tension between adding new members and ensuring susceptibility.

These themes aside, antecedent law deserves to be named as such and examined. Our day-to-day lives are largely defined by the people around us and their civic qualities, rather than by the sea of words—unknown and unknowable to most—that gather dust in law libraries. And yet the law played a role in ensuring the presence of those around us and their susceptibility to it, as it will in the case of future generations. It is that role which this article examines.

I. DESCRIBING ANTECEDENT LAW AND ITS FUNCTIONS

Antecedent law is law that, whether by proscription, permission (such as a broad constitutional right to procreate), obligation, or omission, determines the creation or presence of people in a given legal system, and through the act of making them present, the attributes or qualities (or civic qualities) they need to be susceptible to law.¹⁹

Antecedent law is best conceived of as a sphere with a clearly defined center. In the center are the clearest cases of civic quality-making through creation, as with the laws determining procreation, immigration, and education.²⁰ It is vital to keep in mind that antecedent law regards civic quality-making *through* the process of making people present—through dictating the circumstances under which a person enters the legal system

¹⁹ It is to be distinguished from the field of philosophical inquiry currently known as population ethics, which is dominated by utilitarians and largely focuses on how population and welfare relate. See Jesper Ryberg, *The Repugnant Conclusion*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), available at <http://plato.stanford.edu/entries/repugnant-conclusion>. Population ethics will partly determine what the substantive content of antecedent law should be, but this brief discussion of the virtues of the form of law raises legal and political questions beyond population ethics—in fact it opens the door to policies based on them.

²⁰ The ways in which education relates to antecedent law are discussed below. See *infra* notes 30-33 and accompanying text.

(the circumstances in which a child is born, or the prerequisites for immigration, for example).

Of course, there are areas of overlap with less antecedent laws as one moves from the center of the sphere. Laws regulating surrogacy contracts, no-growth residential zoning, and parental liability laws involve traditional forms like contract and property law, but they may also play a lesser role in determining procreation. Thus, whether a form of law is antecedent depends on the degree to which it determines the creation or presence of persons in the system, and through that, the attributes they need to be susceptible to law.

Note too that antecedent law, as defined here, is not particularly concerned with people exiting the polity, as are laws regulating emigration, genocide, assisted-suicide, and the death penalty, for example.

The notion of someone becoming present within a given polity through immigration or procreation seems fairly straightforward. But what does it mean to be susceptible to law, or to have certain civic qualities necessary to be susceptible to law? This brief article cannot even begin to really address this issue, so the following discussion will be more in the nature of creating a placeholder and laying out a few basic principles around it.

First, civic quality need not be an all or nothing matter, but may be more like a spectrum, reflecting various degrees of susceptibility. According to some theorists, the minimum for one to be considered a member of a legal system is something just above constant physical coercion.²¹ It could begin with something as simple (and base) as “fear, or compliance for the sake of some pathetic scrap of reward, or compliance based on habit, prejudice, ideology, or false consciousness. . . . [A] general habit of obedience.”²²

The civic quality spectrum might move from that minimum towards something like Stephen Macedo’s “capacities and dispo-

²¹ See *supra* note 4.

²² Waldron, *supra* note 4, at 176 (quoting JEREMY BENTHAM, OF LAWS IN GENERAL ch. 4 (H.L.A. Hart & J.H. Burns eds., 1970) and JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 242ff (W. Rumble ed., 1995)).

sitions conducive to thoughtful participation in the activities of modern politics and civil society,”²³ or Rawls’s minimum degree of “moral personality” or “political virtues” to engage in social cooperation.²⁴

At the far end of the spectrum “we can imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions. Perhaps even human beings may be transformed to become such creatures.”²⁵ Such beings would use the law in a given legal system to guide their behavior in the absence of any coercion, and in the absence of any material incentives or disincentives, associated with the law.²⁶ That is, citizens would adhere to the law without its imposing any of the coercive sanctions typical of either power-based (political) or material incentive/disincentive (economic) systems.²⁷ The citizens would be legal persons, responsive to the stimuli of the norms alone, rather than political or economic persons responsive to the coercive stimulus of the stick or the incentivizing stimulus of the carrot, so to speak. The test for such a system, one comprised of persons possessing this highest degree of civic quality, would literally be compliance with the

²³ Christopher Wolfe, Book Review, 46 AM. J. JURIS. 277, 278 (2001) (reviewing STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000)) (quoting MACEDO, at 10); see Maxine Eichner, *Who Should Control Children’s Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1361 (2007) (describing why a democracy requires critical thinking in its citizens).

²⁴ See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18, 20, 142 (Erin Kelly ed., 2001). For example, such a person would not think their being wealthy is a good reason to accept a system that favors the wealthy. See *id.* at 18.

²⁵ RAZ, *supra* note 4, at 159. Raz expresses some doubt that humans can reach this point. See *id.* at 160-61.

²⁶ See FINNIS, *supra* note 4, at 247 (“[T]he motives or reasons which people have for complying with and acting upon stipulations presented to them as authoritative (and for being willing to do so should occasion arise) vary widely.”). Antecedent law’s civic quality-making aspect would concern creating such motives and reasons in persons, moving in the direction of allowing them to accede to valid laws in the absence of coercion. Finnis refers to the elementary distinction between the directive and coercive forces of law; that law allows for the latter “is not the same as saying that one cannot conceive of law without coercion.” *Id.* at 254.

²⁷ For a related sociological discussion regarding the different ways in which prisons, business firms, and universities achieve norm compliance, see generally AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS (1961).

legal norms without any associated coercive sanctions, or economic costs or benefits.

Perhaps this civic quality is simply what Richard Posner refers to as altruism, or dutiful altruism. "When defined broadly, as helping behavior not motivated by the promise of reward or the threat of punishment, altruism is something that can be and often is motivated by love, or by some dilute form of it such as compassion or sympathy."²⁸ Persons motivated by this quality to act in accordance with certain norms—norms that exist to benefit others—are doing so for a very different reasons than when they comply with those same norms because of political or economic stimuli. If law, politics, and economics are distinct disciplines, then we would say that a system of motivation without (or with less) coercive sanction (power), or economic costs or benefit (economics), is more *legal*.

This higher degree of civic quality would differ from the autonomous neo-liberal subjects that might be the subjects of a Rawlsian state. If we take Rawls's difference principle as an example,²⁹ a self-interested person possessed of sufficient reason, in the original position, would accede to the principle knowing that they themselves might occupy the least advantaged socio-economic positions of society. But we can imagine persons so empathetic as to accede because they can internalize the perspective of others who might occupy those positions.³⁰ Such persons—our human angels—might promote a difference principle in law without fear of sanction or the need for material benefit.

Conceived of in this way, the entire spectrum of civic quality may be little more than degrees of both education and empa-

²⁸ See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1658-663 (1998).

²⁹ See RAWLS, *supra* note 24, at 99. The principle, stated crudely, allows inequalities in the distribution of goods in a given society only if the inequalities benefit the members of that society who are worst off.

³⁰ Thomas Nagle refers to altruistic motivation as the "recognition of the desires and interests of others, and requires no desires in the agent except those that are motivated by that recognition." THOMAS NAGLE, *THE VIEW FROM NOWHERE* 151 (1986) (citation omitted). "[P]ain, though it comes attached to a person and his individual perspective, is just as clearly hateful to the objective self as to the subjective individual. . . . The pain can be detached in thought from the fact that it is mine without losing any of its dreadfulness." *Id.* at 160.

thy. Law exists between persons, and susceptibility to it may be a matter of mentally positioning oneself to experience others' understandings and interests. While we may assume that any legal system must be made up of rules backed by coercion or material benefit and deprivation because that is the way it is today, empathy (a phenomenon that exists to "expand understanding of others") remains a distinct and prominent part of legality.³¹ As a normative, and not descriptive, proposition, we can say that whatever the role of power and economics in legal systems today, we *ought* to create systems in the future—by creating the people that comprise them—which are more legal than political or economic, because they are systems of persons that comply with norms without any associated coercive sanctions, or economic costs or benefits.

But the key point of all of this, for purposes of describing antecedent law, is that for law to exist, the people present must have at least some minimum civic qualities such that they are made susceptible to it.³² The law needs people to be made in certain ways.

Civic quality, so understood, like presence in the polity, can be determined by law. As we begin to move up the spectrum, education law plays an obvious role. "These qualities do not simply arise in citizens spontaneously, but require nurture,"³³

³¹ Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576, 1578 (1987) ("This article rejects the assumption that legality—by which I mean the dominant belief system about the Rule and role of Law—and empathy are mutually exclusive concepts.").

³² See, e.g., FINNIS, *supra* note 4, at 262 (referring to the "need of almost every member of society to be taught what the requirements of the law—the common path for pursuing the common good—actually are"); HART, *supra* note 1, at 189 ("unless certain physical, psychological, or economic conditions are satisfied . . . no system of laws or code of morals can be established"); THOMAS HOBBS, *LEVIATHAN* 220 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651) (noting that it is against the duty of the sovereign "to let the people be ignorant, or misinformed of the *grounds, and reasons* of those his essential rights . . . [A law] is not (as a civil law) any obligation but by virtue only of the law of nature, that forbiddeth the violation of faith; which natural obligation if men know not, they cannot know the right of any law the sovereign maketh. And for the punishment, they take it but for an act of hostility . . ." (emphasis added)). Rawls, referring to the reasonable, free, and equal people that comprise his ideal polity, says that "basic institutions must educate them to this conception of themselves." RAWLS, *supra* note 24, at 56.

³³ Eichner, *supra* note 23, at 1341; see also *id.* at 1340 n.8 (referring to the need for people of "sufficiently high quality" in democracies (quoting JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 290 (1950))).

though the educational process by which they are instilled (what might be called a nurture-based form of social engineering) is hotly contested as a matter of political theory and constitutional law.³⁴ Education law plays a central role in antecedent law because, while it normally does not determine whether persons enter the polity,³⁵ it can determine the circumstances (relative to susceptibility to law) in which they enter. Imagine, for example, a state with a written system of laws that vigorously promotes childbearing, and the result of applying those policies in communities in which the children are never taught to read. Had the state used education law to alter those communities' educational systems, the persons born into them would relate to that state's laws in a different way than had the state not done so.

But there is another role education, and education law, plays with regard to the notion of antecedent law. The existence of education law, or the legal requirement that persons be educated during that phase between incomplete personhood (the age of minority) and complete personhood, proves the existence antecedent law today. Education law "makes" people because they are not fully admitted into, or present in, the polity until they have gone through the phase—minority—during which we presume they are being educated. If this phase were not required, we would admit minors as complete members of the polity, to vote, serve in the military, hold office, etc. But instead we require that they go through a phase in which they are presumed to be educated. This is a drawn-out period of entrance into the polity, in which education law makes the person who will be admitted. Age here is only an indicator that the person lacks some requisite quality to be permitted to fully join the pol-

³⁴ See generally Eichner, *supra* note 23 (developing a framework to balance the needs of the particular state, parents, children and liberal democracies generally in controlling students' education in the public schools and the development of the "civic virtues").

³⁵ Compare Locke's focus on children actually obtaining reason prior to joining society, see JOHN LOCKE, *THE TWO TREATISES OF GOVERNMENT* 309 (Peter Laslett ed., Cambridge Univ. Press 2003) (1690) (using the term "may" when discussing whether, with age, children will have sufficient reason), and *id.* (referring to care "as long as they should need to be under it"), with the more simplistic and presumptuous focus on student's age in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

ity. For Locke, persons that were not actually educated were not necessarily ever made full members of the polity.³⁶

In addition to education law, laws that can determine procreation or immigration can also determine some form of civic quality by determining the circumstances into which we are born,³⁷ or the civic qualities that one must have when he or she is allowed to immigrate.³⁸ Consider cases in which courts have chosen to issue no-procreation probation orders, rather than no-custody probation orders, to recidivist neglectful and/or abusive parents who are adjudged, usually by family courts, to be legally unfit as parents.³⁹ No-custody orders usually mean that any future child is born into state custody, and as such, he or she will be more likely to commit crimes than the average child. Children in foster care are sixty-seven times more likely to be arrested than children outside of foster care.⁴⁰

³⁶ *Id.*

³⁷ Rawls refers to the family's role in "the orderly production and reproduction of society" of "raising and caring for children, ensuring their moral development and education into the wider culture." RAWLS, *supra* note 24, at 162-63. Families must "fulfill these tasks effectively." *Id.* at 163; see also GARY STANLEY BECKER, A TREATISE ON THE FAMILY 147 (2d ed. 1991) ("[T]he interaction between quantity and quality explains why the education of children, for instance, depends closely on the number of children . . ."); Susan J. G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 T.M. COOLEY L. REV. 273, 302 (1991) ("[W]hen people have fewer children, the value of each individual child increases enormously. Parents are willing to spend more on each child, e.g., by investing more in each child's training.").

³⁸ See, e.g., Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 263 (2001) (discussing various bars to admission of non-citizens, including refusal of an alien's admission into the U.S. for admitting having committed the essential elements of a crime of moral turpitude).

³⁹ See generally Carter J. Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 374 (2007).

⁴⁰ See *id.* at 374 n.21; *Santosky v. Kramer*, 455 U.S. 745, 789 (Rhenquist J., dissenting) ("It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline."). Consider John Stuart Mill's take on the circumstances one is born into:

Capacity for other nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance; and in the majority of young persons it speedily dies away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, are not favorable to keeping that higher capacity in exercise.

Matters that seem to be about education may also be seen as matters of procreation. In *Wisconsin v. Yoder*⁴¹ the Court held that Amish children could not be placed under compulsory education past the eighth grade, focusing on the minimum education one needs to participate as a citizen of the United States. But that issue arose only because the children at issue were *first* born into the Amish community; that is, born under the legal permission of a broad constitutional right to procreate.

Note that there may also be some relation between the number of citizens antecedent law creates and the civic quality they will possess; that is, the number of citizens a given state with limited resources can produce while maintaining a certain level of civic quality in them. Using the distinction above, between legal persons on the one hand and political and economic persons on the other, we can imagine that a state might have to spend different levels of resources on a given citizen to make him or her merely responsive to coercion or material incentives—the stick and carrot so to speak—than the state would have to spend to create citizens disposed to comply with legal norms without *any* associated coercive sanctions, or economic costs or benefits. These latter “angels,” as Raz calls them,⁴² may require significantly more resources, and as such the state would be able to make far less of them in a given generation. In other words, there may well be an inverse relation—as there is in making many things—between quality and quantity.

As an interesting aside, we might view criminal law, with its use of incarceration and subsequent disenfranchisement (altering one’s presence in the polity),⁴³ as well as its rehabilitation

JOHN STUART MILL, *UTILITARIANISM* 10 (George Sher ed., 2d ed., Hackett 2001) (1863); see also *id.* at 14 (“Genuine private affections and a sincere interest in the public good are possible, though in unequal degrees, to every rightly brought up human being.”).

⁴¹ 406 U.S. 205 (1972).

⁴² RAZ, *supra* note 4, at 159.

⁴³ See Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1028 (2004) (“The creation of a criminal caste leads to permanent ostracization. Modern penal law is often purposefully used as a method of stigmatizing and separating offenders.”). Professor Yankah objects to the political ostracization of criminals based on assessments of their character, arguing that political equality precedes moral merit and proposing a purely act-based theory instead. See *id.* at 1043-63. Antecedent law would make assessments before a prospective child, or intending immigrant “arrives” in the

motive (rehabilitating towards some level of civic quality),⁴⁴ as a failing attempt to impose antecedent law post hoc. We temporarily, or in the case of the death penalty, permanently, exclude persons from the polity who lack the minimum civic qualities presence requires. It is a failing attempt because the harm done from the crime committed may be irreparable.

A. Antecedent Law Already at Work

Antecedent law is not as strange as it might seem. Every polity has law which deeply influences the procreation of its members (behavior that, per Posner, determines "the size and quality of the population.")⁴⁵ The state's influence in these matters is especially visible in the Peoples Republic of China, for example, where the complex, and often misunderstood, family planning policies have dramatically changed its population's "quantity (slowing growth and limiting size) and its 'quality' (enhancing not only health and education but also social morality and political commitment)."⁴⁶ In these policies state regula-

polity, and hence it and its assessments precede their political equality. More importantly, the substantive antecedent law suggested here might actually promote de facto equality, at least in terms of civic quality, by seeking a minimum level for all new entrants to the polity.

⁴⁴ See FINNIS, *supra* note 4, at 264 (referring to criminal law, he states, "[I]t may work to restore reasonable personality in the offender, reforming him for the sake not only of others but of himself . . .").

⁴⁵ RICHARD A. POSNER, *SEX AND REASON* 187 (1992).

⁴⁶ SUSAN GREENHALGH & EDWIN A. WINCKLER, *GOVERNING CHINA'S POPULATION: FROM LENINIST TO NEOLIBERAL BIOPOLITICS* 1-2 (2005); see also INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLES REPUBLIC OF CHINA, *HUMAN RIGHTS IN CHINA: FAMILY PLANNING AND PROTECTION OF HUMAN RIGHTS* (Nov. 1991), available at <http://www.china.org.cn/e-white/7/7-VIII.htm> ("The Chinese government implements a family planning policy in the light of the Constitution, with the aim of promoting economic and social development, raising people's living standards, enhancing the quality of its population and safeguarding the people's rights to enjoy a better life."); Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 *TEX. INT'L L.J.* 51, 54 (2000) ("China's population program is designed to maintain an optimal population size, high population quality, and proper population structure. Curbing China's rapid population growth not only benefits Chinese people, but also contributes to stabilization of the world population and promotes sustainable development of human beings."). Greenhalgh and Winckler discuss the historic shift from restricting quantity to promoting quality as a norm, with a focus on health and education, and a trend of creating "autonomous" neo-liberal subjects assumed by the liberal state, GREENHALGH, *supra* at 217, or "neo-liberal subjects par excellence." *Id.* at 236.

tion of people-making is explicit, and concern for quality limits quantity in part because educational resources are finite.⁴⁷

State regulation may be less obvious in the United States, but it is still present. In *Meyer v. Nebraska*,⁴⁸ the Court said that “the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally.”⁴⁹ Later, in upholding limits on public assistance to families, the Court found that classification based on “family size” “neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion.”⁵⁰ Justice Powell once opined that some “intentional governmental effort[s] to ‘penalize’ childbearing” are constitutional.⁵¹ Recently state courts have successfully issued no-procreation orders to abusive and neglectful parents.⁵² Consider that, at the same time, when liberal states recognize and protect a broad procreative right they are also creating the persons among whom the law will exist.

Thus, when states decide to give a tax credit to promote childbearing or charge a fee to discourage it, legalize or ban abortion, promote or prevent certain forms of immigration, provide funding for higher education or leave the whole matter to parents, they make a choice that can determine the presence, number, and susceptibility to law (or civic quality) of persons within their borders—and those of generations to come.⁵³ And, it seems that legal scholars and courts—perhaps limited by a con-

⁴⁷ See *supra* note 46; see also BECKER, *supra* note 37 at 147 (“[T]he interaction between quantity and quality explains why the education of children, for instance, depends closely on the number of children . . .”).

⁴⁸ 262 U.S. 390 (1923).

⁴⁹ *Id.* at 401. *Meyer* has been called a foundation case “for an entire constitutional theory of family.” Barbara Bennett Woodhouse, “Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992).

⁵⁰ *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)).

⁵¹ *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651-52 (1974) (Powell, J., concurring) (citing *Dandridge*, 397 U.S. 471). John Rawls argued that “principles of justice . . . impose constraints on the family on behalf of children who are society’s future citizens and have claims as such.” RAWLS, *supra* note 24, at 165.

⁵² See Dillard, *supra* note 39 and accompanying text.

⁵³ How, and to what degree, recent public policies have affected things like fertility and educational attainment is far from certain, see *infra* note 80, and some scholars doubt the ability of law to significantly change these things. See Larry D. Barnett, *The Regulation of Mutual Fund Boards of Directors: Financial Protection or Social Productivity?*, 16 J.L. & POL’Y 489, 529 (2008).

cept of law that seems to ignore the role law plays in the creation and quality of those it seeks to regulate—have largely overlooked this fact.⁵⁴

B. Advantages of Antecedent Law

Thinking about our existing forms of law as divided into law and antecedent law has practical advantages. First, if we ignore the role law plays in determining how people come to be present in a polity, and through determining the circumstances of their entry, also whether they possess civic quality, we take much for granted and consequently miss an important part of how law operates. For example, a lawyer asked to devise a policy to curb anthropogenic greenhouse gas emissions might present options for polity members to alter their behavior in certain ways. But she might not consider whether the legal system fostered population growth in a way that contributed to the problem,⁵⁵ and whether the legal system is busy making people who are not likely to alter their behavior when limits are enacted. She might not consider whether the law played a role in creating the existing basic state of legal affairs (people causing problems and their level of willingness to alter their behavior), and whether the law can create a different basic state of legal affairs at some point in the future.⁵⁶

Likewise, a lawyer or legislator faced with growing civil strife over the price of fossil fuels might look for ways to change the law in order to increase supply. But she might not question the ever-growing number of users who are creating the demand (quantity), or consider that some users—born or immigrating

⁵⁴ See, e.g., Pierce, *supra* note 17, at 109 (“[C]ourts speak of the ‘naturalness’ or ‘inevitability’ of population growth in the same way one might speak of the naturalness or inevitability of death.”) There are of course exceptions. See generally 1 POPULATION AND LAW (Luke T. Lee & Arthur Larson eds., 1971).

⁵⁵ See, e.g., Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans -- Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 359-60 (2004) (attributing the failure of states to attain the goals of the Clean Air Act in large part to population increases, which nullified “much of the progress made under the Clean Air Act”).

⁵⁶ For a discussion of law, population, and climate change see JOHN FIROR & JUDITH E. JACOBSEN, *THE CROWDED GREENHOUSE: POPULATION, CLIMATE CHANGE, AND CREATING A SUSTAINABLE WORLD* 91-94 (2002).

under particular circumstances—might have already begun voluntarily reducing their personal demand in the interest of the polity as a whole (quality).⁵⁷

A second advantage is that crystallizing antecedent law as a type of law allows us to separate its form from its possible content—including odious content (like eugenics), which could otherwise be confused with the form and might lead us (and may have led us historically) to reject the form entirely. A state can regulate the quality and size of its population without practicing eugenics. Any analysis that makes separating form and content difficult, or leads states to ignore the quality and size of its population altogether, has serious flaws. It overlooks a critical perspective on the seemingly private issues, like procreation and the education of our children, which will determine the polity for us and for future generations.

For example, Part II of this article argues for a substantive antecedent law that seeks to promote civic quality and an optimal population range as a means of maximizing autonomy. Rejecting all of antecedent law, because we conflate it with eugenics or for any other reason, leads us to avoid ever experimenting with such an approach.

Another advantage in grouping existing areas of law, like population or immigration law, under one form is that these areas of law tend to share a particular breed of heated controversy that concerns the legal status of those to whom they pertain, i.e. whether a fetus is a person or an undocumented worker is “illegal.”⁵⁸ A form of law focused on the creation or presence of people and their susceptibility to law may help reframe the debates around the common, and perhaps most compelling, interest: determining with whom we are in the polity.

Having described the form antecedent law, seen that it exists in the forms of law it groups together, and noted some of its advantages, we can now distinguish it from other forms of law. But it will help to first make two observations.

⁵⁷ As discussed in Part III.C., each polity has sub-groups which benefit from avoiding antecedent law approaches.

⁵⁸ Note that education law does not seem to raise this particular controversy, but that is probably because we do not view students as outside of the polity. However, there is no reason why that must be the case. *See supra* note 33 and accompanying text.

It is possible that people will find something objectionable about the form itself; something less easily articulated than the specific counter-arguments discussed in Part III. It could be that we tend to resist aggregating individual acts of procreation or immigration and thereby obscure their public nature, such that it is difficult to see beyond the wants and desires of any one particular prospective parent or intending immigrant. It could be that the relatively recent history of eugenics and social engineering by totalitarian regimes casts its shadow so broadly as to preclude viewing other persons, and through them the law, as playing a role in determining our existence and basic qualities. It could also be that we view the new presence of any human life as valuable in and of itself, regardless of civic quality. Unlike murder, the average act of procreation was probably (though perhaps no longer is) beneficial to our species' domination. Moreover, for lawyers resistant to the idea of antecedent law, it could be difficult to consider that the greatest influence we can exert on the world is not through the coordination and constraint of extant persons, but by replacing the persons in our polity.

That said, it is worth noting, and a bit ironic, that this discourse (like virtually all focused discourses involving legal and political theory) occurs in a world shaped primarily by something like antecedent law: academia. Academia is, after all, based on a process of determining presence through admission and exclusion along a baseline very much like the baseline of civic quality described above.

Academic discourse occurs only *after* a common core competency has been established and maintained among a limited population, optimal in number (the number of students admitted), which is achieved by employing the antecedent law model. And, "university law" is not just about admission of persons capable of reasoning along the upper ranges of the spectrum,⁵⁹ it also seeks to exclude students with disciplinary records, or those incapable of composing themselves in a manner conducive to the beginnings of a well ordered society, much the like the one

⁵⁹ Hobbes notes that "the Universities are the fountains of civil, and moral doctrine." HOBBS, *supra* note 32, at 496; *see also id.* at 225.

Rawls describes. Arguably, university law tracks the civic quality spectrum described above, from the requirement that all conform their behavior to the basic code of conduct, to promoting more selfless, empathetic, and altruistic behavior to benefit the community (for example, by requiring pro bono service as a prerequisite to graduation).

Arguably the focused political and legal discourse did not retreat to the universities because they are voluntary associations in Rawlsian sense, but because the minimum level of education and civic quality necessary to sustain it does not exist in society at large. Should we apply the non-antecedent law model to the universities and hope to achieve the same goals, or apply the academic model to society? If the former, law professors may wish to open their classes to the general public—who as we know are presumed to know the law regardless and are at serious risk if they do not.⁶⁰

C. Antecedent Law's Unique Role for the Polity

With these points in mind, we can identify antecedent law's unique role for the polity by heuristically using four concepts: the social contract, legal realism, the dissolution of civil society, and a particular empirical view of any given polity.

1. The Social Contract

Stated crudely, social contract theory views the polity from the perspective of people who have (or would) come together to form a contract or agreement, consenting to being made subject to the power of others in exchange for certain benefits. But, as in our account of law, there may be something missing. How does this picture account for the birth of persons within the polity, that is, how does it account for extant parties consenting to the addition of these new parties to the contract? Certainly something like Locke's tacit consent, i.e., choosing to remain in

⁶⁰ See, e.g., Dan M. Kahan, *Ignorance of Law Is an Excuse -- But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997).

a polity, explains how *they*, the new members, come to agree,⁶¹ but the concept does not immediately capture how the extant members agree to these new members joining, or becoming present.⁶² While the ethical or political concept of a social contract is something quite different from the concept of a modern juridical contract, it makes little sense to use the concept at all if we are going suggest that it is irrelevant who is allowed to join as a party, or how many new members are allowed to become parties.

Regulating who is or becomes a party to the social contract may be more important than the terms of that contract. The terms are of little value if the other parties cannot or will not comply, or be held accountable for failing to do so. Certainly, an individual's willingness to enter a contract is determined not only by its terms, but also depends significantly on with *whom* exactly the individual is contracting and the likelihood that the second person will follow through or compensate the first for their failure to do so. In this way, a concept of law and of a social contract that pays no special attention to the addition of new parties—to who they are or their civic quality—seems incomplete, especially in a democracy. Under Hobbes's absolute sovereign, we might care very little about other parties because our fate will be primarily in the hands of the sovereign, not the other parties. But under a participatory government, we are likely to care significantly more about regulating the parties, since we are subject to our fellow contractors and their failings.

Of course, while granting individual consent to each new member would be impossible, granting consent using agreed-upon standards for admission would not. Such standards already comprise the substance of antecedent law, as in the case

⁶¹ For a discussion on the lack of consent by prospective children to their birth, see Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 123-24 (1999).

⁶² Of course, some scholars have taken the perspective of current members and their willingness to admit and enter into contract with others, in some case with those who may be disabled or of another species. See, e.g., MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006). But what if the prospective members are not disabled or of another species, but will simply lack some sort of minimum civic quality?

of immigration laws.⁶³ But again, traditional forms of law and social contract theory take no *special* notice of this, or of the role procreation plays here—special, that is—in terms of treating the matter as of antecedently unique importance to members of the polity.⁶⁴

The social contract construct also accentuates the importance of the actual *number* of new contract parties. Given the increasing global concern over the environment, it is no surprise that contemporary political scientists display renewed concern with issues of “world ownership,” that is, the claim each person has to a share of the world’s natural resources.⁶⁵ This renewed concern emphasizes the importance of access to resources, a matter which has long been considered by social theorists. Both Hobbes and Locke viewed increasing population and the resulting competition for scarce resources, or as Locke put it, the “quarrels and contentions,” as the reason that persons felt the need for government⁶⁶ and as a possible threat to that government’s

⁶³ Contrast this with the constructive consent of the new parties themselves. See, e.g., John Lawrence Hill, *What Does It Mean to Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 384 (1991) (“[T]he procreative right arguably is contingent upon the constructive consent of the resulting child.”).

⁶⁴ Though it is beyond the scope of this article, one natural result of the law not focusing specifically on that which determines the creation of persons, and their civic quality, or on providing a vehicle of consent, would be that it leads society to treat the new entrants as less than full members of the polity. For example, if a person refuses to agree to a political relationship with another, the second is stranger to the first than if the first had agreed. The second has forced himself on the first.

⁶⁵ For a thorough examination of the competing perspectives see, for example, LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2000); MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY (2003).

⁶⁶ For Locke natural liberty is first challenged by the growing presence of others, as before that growth “there could be then little room for quarrels or contentions about property so established. . . . Nor was this appropriation . . . any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use.” LOCKE, *supra* note 35, at 290. For Hobbes, the first of the “three principle causes of quarrels” is “competition” which is the natural state of “men in multitudes.” HOBBS, *supra* note 32, at 76, 99; see also HART, *supra* note 1, at 96.

Society can improve resources to partially compensate for the problem, but this is not a complete solution. Hume refers to the possessions one can acquire, but explains that “there is not a sufficient quantity of them to supply every one’s desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the *instability* of their possession, along with their *scarcity*, is the chief impediment.” DAVID HUME, MORAL PHILOSOPHY 89 (Geoffrey Sayre-McCord ed., Hackett 2006). And

stability in the future.⁶⁷ If we apply the social contract construct to these issues, then arguably each contractor competes for scarce resources according to the terms of the contract. In this system, new competitors are necessarily of concern, perhaps of compelling interest, to existing (and future) competitors. At the very least, the addition of each new competitor may well reduce the share of resources each existing competitors can claim.⁶⁸

To some extent this simple fact is at the heart of the debate today over negative and positive rights—especially for those who think that rights are essentially about property.⁶⁹ Many positive-rights theories are grounded on the moral claim that each new person needs (has a claim to) a certain bare minimum of property in order to survive, and that this claim defeats others' competing claims to continued ownership of the relevant property through labor and acquisition.⁷⁰ How is it possible to ignore the role played by the addition of new claimants to the picture?

so, "tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin." *Id.* at 84.

⁶⁷ See HOBBS, *supra* note 32, at 228-29:

The multitude of poor (and yet strong) people still increasing, they are to be transplanted into countries not sufficiently inhabited; where nevertheless they are not to exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground to snatch what they find, but to court each little plot with art and labour, to give them their sustenance in due season. And when all the world is overcharged with inhabitants, then the last remedy of all is war, which provideth for every man, by victory or death.

It is worth considering whether some sort of provisional antecedent natural law which ensured few people with high pre-civic qualities (peaceful and reasonable as opposed to violent and unreasonable) would have prevented the need for a social contract. That law might simply be something like practical reasonableness. See FINNIS, *supra* note 4, at 251; HOBBS, *supra* note 32, at 174 ("The law of nature and the civil law contain each other, and are of equal extent.")

⁶⁸ Of course there is an economic counterargument that additional members can actually increase (improve) the value of the society's resources. That argument will not be addressed here, but suffice it to say that it generally presumes a lot about relative value, does not account for claims to unappropriated resources (and resources not subject to appropriation), and does not account for the fact that the type of claims each person has (as opposed to their relative value) would be altered by the addition of new competitors.

⁶⁹ See, e.g., HILLEL STEINER, AN ESSAY ON RIGHTS 93 (1994).

⁷⁰ For an influential account of such a right, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

When modern contract theorists like Rawls abstract from Hobbes and Locke, they push into the background the role that nature—and the scarcity of natural resources caused by human proliferation and increased competition⁷¹—played in the formation of the social contract construct.

2. Legal Realism

One of the most significant contributions legal realism (and later, Critical Legal Studies) makes to the concept of law⁷² is the suggestion that for judges, rules are not the primary determinant of legal outcomes.⁷³ If this is so, then it seems logical to assume that formal law or rules may play little or no role in the day-to-day decisions (whether to steal, pollute, etc.) of the average person, who, unlike a judge, has no legal training and very limited knowledge of the law that might apply to his/her conduct.⁷⁴ Therefore, we should probably care more about who joins our contract (at least with regard to the civic qualities higher on the spectrum) and according to what law that is determined, than we care about the contract's formal rules of conduct, which,

⁷¹ See JAMES TULLY, *AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS* 35 (1993) (discussing population as a factor in the formation of society).

⁷² For a well-known critique of legal realism, see HART, *supra* note 1, at 143-147, and DWORKIN, *supra* note 4, at 36-37.

⁷³ See, e.g., Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

⁷⁴ See, e.g., Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 468 (2007) ("We failed to refute the null hypothesis that criminal law has no influence on sexual risk behavior."); Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 656 n.5 ("[I]n many contexts, proliferation of rules means proliferation of lawlessness; the rules may be too numerous and complex for normal people to master." (quoting Stephen Williams, *The More Law, the Less Rule of Law*, 2 GREEN BAG 2D 403, 405 (1999))). "In the Robinson and Darley study, respondents were asked about their knowledge of various legal rules, such as the duty to report a crime, etc. Interestingly, the distribution of responses was unaffected by the actual rule in the respondents' home state." *Id.* at 259 n.11 (citing Paul H. Robinson & John M. Darley, *Does Criminal Law Deter?: A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004)). Note too that "it is important not to take the mere fact that the population by and large conforms to the law as evidence that it accepts it and guides its behavior by it." RAZ, *supra* note 4, at 125. Raz notes that people may coincidentally conform their behavior to the law while being totally unaware of it, or even being opposed to it. See *id.* He focuses on law enforcing institutions as a test for what norms are part of a legal system and whether a system is in force, which raises the image of a populace largely ignorant of the law until it is too late.

according to legal realism, have only limited impact. Antecedent law becomes more relevant as the efficacy of traditional, or formal, law declines.

Even Hart, legal realism's harshest critic, notes the importance of susceptibility to law and the nuances of what *law* in this context might mean. This is clear, for example, in his discussion of the "rational connection between natural facts and the content of legal and moral rules;"⁷⁵ his reference to "certain physical, psychological, or economic conditions" that must be satisfied before any "system of laws or code of morals can be established;"⁷⁶ and his recognition that only those laws that conform to a certain type can function successfully. Advances in social sciences since Hart wrote in the 1950s have more firmly established this point. Scholars like Donald Braman, Dan Kahan, and Larry Barnett have empirically demonstrated that formal law plays a smaller role among citizens than their individual qualities and attributes,⁷⁷ many of which are determined by the circumstances in which those citizens enter the polity.

Thus, to the extent formal law does not guide behavior, that aspect of law which creates citizens and determines their civic quality will fill the gap. Just as antecedent law focuses on the civic qualities of immigrants⁷⁸ (rather than simply relying on the effect of non-antecedent laws once the person arrives), it also determines presence and civic quality by regulating educa-

⁷⁵ HART, *supra* note 1, at 193.

⁷⁶ *Id.* at 193-94.

⁷⁷ See, e.g., LARRY D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT: A MACROSOCIOBIOLOGICAL PERSPECTIVE ON LAW (1993) (demonstrating that law is not the dominant cause of social change, but is primarily reactive to it); Barnett, *supra* note 53, at 528-31; Donald Braman & Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, in HOW LAW KNOWS 93, 93-115 (Austin Sarat et al. eds., 2007) (laying "the groundwork for a mode of political and legal analysis that is cognizant of the influence of cultural cognition"); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (challenging the notion that citizens in a liberal state *can* cognize secular, harm-based laws without wrongfully imputing certain consequences based on their cultural biases); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006) (finding epistemic origins for political conflict in citizens' cultural cognition, or tendency to filter legal and political perceptions through pre-existing cultural values). But see Bilz, *supra* note 10, at 102 ("[I]t is possible, even likely, that the forces operating between law and morality are bidirectional. Still, it is worth thinking about whether, and when, the causation will run as an initial matter in one direction versus the other.").

⁷⁸ See *supra* notes 21 & 53 and accompanying text.

tion and by encouraging or discouraging procreation—with substantial consequence for others.⁷⁹ This does not require empirical evidence and inductive reasoning to understand. Indeed Hart seems to deduce at least a minimum set of requisite conditions in the quote above.

It may seem that legal realism undercuts not only formal law, but also antecedent law: Why would antecedent law be any more effective than formal law in guiding behavior?⁸⁰ However,

⁷⁹ See generally Dillard, *supra* note 39; James J. Heckman & Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, 29 REV. AGRIC. ECON. 446 (2007); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-reports*, 94 AMER. ECON. REV. 155 (2004). For example, “[i]t is now well established that education reduces crime.” Heckman, *supra* at 454. “Poorly educated teenage mothers in low-income families are much more likely to produce children who participate in crime.” *Id.* at 455. “Some of the most convincing estimates of the impact of adverse early environments on participation in crime come from interventions designed to remedy those environments.” *Id.* at 456. Also,

[m]ost scholars recognize that absence of a father, low levels of financial resources, low parental education and ability, a lack of cognitive and emotional stimulation, and poor parenting skills are characteristics of adverse environments. Determining the relative importance of these factors is an ongoing debate. Each seems to play a factor in affecting child outcomes.

Id. at 460. “The growth of adverse childhood environments explains a substantial part of the problems of schools, skills and crime in American society.” *Id.* at 466. “Ability formed in the early years is also important in explaining crime, teenage pregnancy, and a variety of social pathologies.” *Id.* at 469. “The social science literature establishes that both cognitive and noncognitive abilities affect schooling attainment, participation in welfare, teenage pregnancy, and crime More able and engaged parents produce more able children.” *Id.* “Redirecting funds toward the early years is a sound investment in the productivity and safety of American society, and also removes a powerful source of inequality.” *Id.* at 488.

⁸⁰ Indeed, consistent with Barnett’s view of the law, there is a dearth of empirical evidence that policies to date have influenced procreation, or even educational attainment levels. See, e.g., Barnett, *supra* note 53, at 529 (“As an example of government regulation directed at activity that is largely social in nature, state statutes requiring minors to attend school until they reach a specified age have generally not had a material impact on the school enrollment rates of minors.”); Anne H. Gauthier, *The Impact of Family Policies on Fertility in Industrialized Countries: A Review of the Literature*, 26 POPULATION RESOURCES & POL’Y REV. 323, 342 (2007) (though reviewing a narrow range of policies intended to affect fertility, Gauthier found “the impact tends to be small and also to vary highly depending on the type of data used and on the type of policies.”). But see Gu Baochang et al., *China’s Local and National Fertility Policies at the End of the Twentieth Century*, 33 POPULATION. & DEV. REV. 129, 145 (2007) (finding that “government mandated fertility and achieved fertility have converged in China”). But this article does not try to inductively establish a particular influence, or level of influence, law has on the subjects of antecedent law as much as it deductively treats those subjects as conceptually distinguishable from other forms of law and involving specialized state interests. The initial hurdle for antecedent law is not empirical evi-

legal realism undercuts only those antecedent laws that are formalistic in nature. In contrast, there could be antecedent laws that determine the circumstances under which people become present in a given legal system by creating effective social norms, e.g., when it is the “right” time to have a child. Perhaps this is the type of antecedent law that would have to be pursued.⁸¹ Indeed, “[i]t is useful to distinguish between the law’s ability to shape behavior through simple reward and punishment (the skeptical view), and its ability to use indirect, subtle, and sophisticated techniques to shape, not only behaviors, but also normative commitments.”⁸²

3. The Dissolution of Civil Society

Both Hobbes and Locke contemplated that a society formed by social contract could possibly dissolve back into the individu-

dence, but taboo. Indeed, the tendency of traditional forms to shuttle antecedent law into the background may explain why we have not studied it and made it more effective.

⁸¹ This would be especially relevant to procreation. For example, Jean Cohen has argued for a reflexive law approach when regulating conduct perceived to be intimate. See JEAN L. CODEN, *REGULATING INTIMACY: NEW LEGAL PARADIGM* (2002). Dan Kahan has noted the problem of “sticky norms.” Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607-09 (2000) (“My concern in this Article is with the ‘sticky norms problem.’ This problem occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm. . . . Some might conclude from the ‘sticky norms problem’ that the law is a relatively ineffective instrument for changing norms. . . . In short, norms stick when lawmakers try to change them with ‘hard shoves’ but yield when lawmakers apply ‘gentle nudges.’”); see also HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 732 (3d ed. 2008) (“Under the acculturation approach, power is understood as productive, cultural, and diffuse—not merely prohibitory, material and centralized.” (quoting Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 695 (2004))). Bilz, *supra* note 10, at 118 (“The lesson from the Prohibition era appears to be that the law can backfire if it extends its reach too far into activities that are perceived as morally acceptable.”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) (“I also argue that the expressive function of law makes most sense in connection with efforts to change norms . . .”). All of this points to the fact that a no-procreation order of the sort discussed in the text accompanying note 108, *infra*, may be more influential as an expression to the community than as an basis for punishment.

⁸² Bilz, *supra* note 10, at 104. Professor Barnett proposes a very specific view of how law benefits society irrespective of its influence on the incidence of the targeted behavior, namely law’s ability to act as a symbol which increases societal cohesiveness. See Barnett *supra* note 53, at 531, 534-37.

als that were formerly its constituents,⁸³ leaving “every man at liberty to protect himself by such courses as his own discretion shall suggest unto him.”⁸⁴ In such a scenario—or even in a state of only relative anarchy, such as during a natural disaster—civic quality and our historic antecedent law (that which in the past determined who is now in the polity) become especially relevant.⁸⁵ The ability to reestablish a government, or even to maintain a Lockean civil society, would seemingly depend on the civic qualities of the persons around us—much as those qualities (or lack thereof) were relevant in our emergence from the state of nature. Similarly, the number of fellow contractors might also be of concern, as it affects competition for scarce resources and the ability of people to coordinate their efforts among themselves. One can imagine the difference between renegotiating terms of a contract to divide scarce resources as between a few hundred, or a few million, people.

4. Our Empirical View of the Polity

As discussed above, our traditional concept of law regulates extant people, taking their presence and civic quality as givens. Such a perspective of law engenders a view of the polity as an undifferentiated whole. Indeed, practically speaking, law is by nature general: the tort law of a given state is not expected to account for every citizen’s idiosyncratic proclivities for negligent behavior. As lawyers, we focus on the rules and not the relevant capabilities of the ruled, which explains why antecedent law is generally overlooked. Although “the American people” figure

⁸³ HOBBS, *supra* note 32, at 77 (referring to degeneration into civil war); *id.* at 210–19 (referring to the causes of the dissolution of commonwealth); *see also* LOCKE, *supra* note 35, at 211.

⁸⁴ HOBBS, *supra* note 32, at 219; LOCKE, *supra* note 35, at 211 (“[S]o every one return to the state he was in before, with a liberty to shift for himself, and provide for his own safety as he thinks fit in some other society.”); *cf.* Joby Warrick, *CIA Chief Sees Unrest Rising With Population*, WASH. POST, May 1, 2008, at A15 (Referring to world population growth, Hayden said that “[m]ost of that growth will occur in countries least able to sustain it, a situation that will likely fuel instability and extremism, both in those countries and beyond.”)

⁸⁵ This discussion suggests that the dissolution of society takes place at a specific moment in time. But there is no reason why it could not be a slow process that ebbs and flows in every state, moving from one relative state of dissolution to another.

frequently in legal and political discussions, little consideration is given to the number or quality of the individuals who comprise this people. Rather, "the American people" is a gestalt image of a unitary mass whose quantity or quality, in terms of specific attributes, is largely passed over.⁸⁶

Because legal theory embraces such an undifferentiated view, it tends incorrectly to institutionalize and thereby distort our perception of the polity. In a very real sense, a polity is the collection of its individual, constituent members,⁸⁷ the state and its laws being merely a useful social construct. As such, it is not static, but rather constantly evolving in tandem with the individuals within it. The proliferation and civic interaction of these individuals, and the law that can influence those processes must be of a particular interest. Yet, these issues are hardly central to our concept and practice of law.

⁸⁶ We could, for example, evaluate any polity in the world simply by assessing the civic quality of its constituents, which would be very different from assessing polities based on military might or gross domestic product. See *infra* Part III.C. In that assessment the United States may not fare well at all. See Eichner, *supra* note 23, at 1364 (citing evidence that Americans lack the knowledge and critical ability to perpetuate institutions like free press, separation of church and state, and the rule of law). "Throughout most of the twentieth century, voting rates in the United States were much lower than in almost all other advanced democracies." Steven L. Winter, *When Self-Governance is a Game*, 67 BROOK. L. REV. 1171, 1202 (2003) (quoting DEREK C. BOK, *THE TROUBLE WITH GOVERNMENT* 387 (2001)). The average American reads at just below the eighth-grade level, see Anita Bernstein, *Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 779 (2006), and there is strong empirical evidence that Americans cannot understand the law even when it is presented to them. See generally Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006). Complying with the law is a whole other matter. "The United States incarcerates more offenders per capita than any industrialized nation in the world: three times more than Israel, five times more than England, six times more than Australia and Canada, eight times more than France, and over twelve times more than Japan." Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 52 (2008) (footnote omitted).

⁸⁷ This truism largely underlies the emergence of the human rights movement.

[T]he acknowledgement of the worth of human personality as the ultimate unit of all law . . . brings to mind the fact that, in international law as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise the collectivity. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts . . .

Steiner et al., *supra* note 81, at 144 (quoting Hersch Lauterpacht, *International Law and Human Rights* 61 (1950)).

II. ONE VALUE ANTECEDENT LAW CAN PROMOTE: AUTONOMY

It is one thing to differentiate antecedent law from the more traditional forms of law in terms of its role for the polity. But why would members of a polity, and by extension the state, especially care about that which determines the presence and civic qualities of its members? What reasons would a state have for using antecedent law?

A. Narrowing the State's Interest

These questions raise the issue of what particular interest (and level of interest) a state has in antecedent law, and what "rarified values"⁸⁸ might underlie particular antecedent laws. Once articulated, these values could then be weighed against the values that might underlie rights, like the right to procreate, with which antecedent laws interfere. For example, the state's interest in or valuing of child welfare has been weighed against a parent's interest in exercising freedom of religion in the context of child rearing.⁸⁹ Note at the outset that the question of whether the state has any interest in antecedent law is itself controversial.⁹⁰

When considering the particular interest a state has in the creation of new citizens, it will be vital to characterize the particular behaviors at issue correctly. For example, one way to articulate the state's interest would be to break antecedent law into its components, examining procreation for example, and to simply look at it in the way many courts have. For procreation, this would mean looking at the state's interest in the creation of human life per se, that is, exclusive of the state's interest in civic quality. Looking to laws that regulate contraception, abortion, fetal protection, and same-sex marriage, we would find that courts have identified compelling state interests in potential life

⁸⁸ J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969).

⁸⁹ See *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.").

⁹⁰ See, e.g., *Regulating Eugenics*, *supra* note 7.

and in vague notions of responsible procreation.⁹¹ Done this way we would say that the state has an interest in ensuring that new members enter the polity.

But that interest does not adequately consider the context and circumstances into which a child is born, that is, the determinants of civic quality. It is dubious that the state has an interest in acontextual people-making—creating people irrespective of the circumstances in which they are born.

A state's interest in antecedent law might be different from its interest in antecedent law's individualized components, at least as courts have traditionally seen them. Focusing narrowly on the components of antecedent law in this way to find the underlying values misses the point of the form.⁹² The form interests us only to the extent that it captures how law contributes to civic quality *through* the creation of those around us—that is, by determining the circumstances in which others become present. A state's stripped down interest in potential life per se—irrespective of the circumstances in which that life enters the polity—does not fully address how that life will affect our own.

B. Promoting Autonomy

Focusing then on that which determines the circumstances in which others become present in the polity, one value which antecedent law can promote is autonomy.⁹³ This is not to say

⁹¹ See, e.g., *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007); Kenneth A. De Ville, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J. L. MED. & ETHICS 332 (1999) (discussing laws intended to protect fetuses from alcohol or drug exposure); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (finding a state's purported interest in responsible procreation, in the context of a dispute over same-sex marriage, to be legitimate).

⁹² Though admittedly, states can be interested in the number of new entrants irrespective of their civic quality. For example, though the PRC family policy focuses on improving the quality of the population, the original focus was on the number of new entrants regardless of the circumstances into which each arrived. See GREENHALGH, *supra* note 46, at 217. Likewise, though U.S. immigration system bars admission based on what it perceives to be civic quality, i.e. as in an applicant having committed certain crimes, it seems unlikely it would do away with annual quota-based limits even if all potential applicants were ideal.

⁹³ Again, this article borrows the concept of autonomy from Raz. See RAZ, *supra* note 12; see also *id.*, at 390-95. There are many ways to determine an optimal population range for a given polity.

that current laws in the United States or elsewhere that might fall under the antecedent law rubric do this. In fact it may be quite the opposite. My point is that antecedent law *can* promote autonomy. More specifically, antecedent law that seeks to promote civic quality and an optimal population range⁹⁴ tends to promote autonomy, perhaps more than traditional forms of law ever can.⁹⁵

However, before the argument is assessed, it will help to lay out a conceptual framework regarding autonomy as a value, and its relation to the legitimacy of law—primarily as it has been developed in Joseph Raz's theory of perfectionism. The point of this is to establish autonomy as a legitimate value that the state can pursue, before then basing the value of antecedent law on autonomy.

Raz has famously rejected the notion that a state need be neutral among visions of the good life, arguing instead that it should promote objectively valuable autonomy, ensuring citizens valuable options in life and taking steps to eliminate worthless ones.⁹⁶ autonomy "permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones."⁹⁷ Raz defends a version of John Stuart Mill's harm principle (crudely stated, the state may use coercion only to prevent harm to others) that is seemingly premised on maximizing a morally valuable and objectively defensible version of autonomy. A full examination of Raz's argument is not necessary here, but suffice it to say that he goes very far towards establishing a liberal legitimization of extensive state action to promote autonomy.⁹⁸

⁹⁴ See, e.g., Alan Carter, *Moral Theory and Global Population*, 99 PROC. ARISTOTELIAN SOC'Y 289, 289 (1999) ("[T]he question of what the optimum human population should be is a pressing one."). Carter proposes a principle based on a plurality of moral values which combines utilitarianism, Kantianism, Aristotelianism, and Rawlsianism, *id.* at 307, the upshot of which requires a significant reduction from the current world population. *Id.* at 312-13.

⁹⁵ Rousseau suggested that two conditions necessary for democracy are a small state and public virtue. ROUSSEAU, *supra* note 5, at 56.

⁹⁶ See RAZ, *supra* note 12, at 401-24 (1986).

⁹⁷ *Id.* at 417.

⁹⁸ For a thorough discussion and critique of Raz's theory see Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. Cal. L. Rev. 1097 (1989);

Although Raz claims that coercion can only be employed to prevent harm to oneself or others, scholars have questioned whether the logical conclusion of his work is in fact that coercion can justifiably be used to ensure autonomy.⁹⁹ For example, John Stanton-Ife has proposed that “[a] moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future.”¹⁰⁰ Stanton-Ife uses the example of gambling: if the state permits people to gamble rather than seeking to eliminate the behavior, it may seem as though the state is promoting autonomy by allowing people to do what they wish. But to the extent the presence of gambling makes people less autonomous, less free to pursue morally valuable activities, this may not be the case. “Could it not be that the availability of some repugnant options *does* detract from the autonomy of some people? The image of the tree surgeon comes to mind. Some branches are lopped off by the tree surgeon for the health of the tree.”¹⁰¹ Professor Waldron finds that in Raz’s theory “to say that coercion may be used only to prevent harm is to say that the autonomy of one person may be threatened only where it is necessary to avoid some unacceptable diminution of the autonomy of another. And Raz subscribes to this view.”¹⁰²

The point of bringing in Raz’s work is not to suggest that antecedent law should employ coercive methods in pursuit of autonomy (though, of course, antecedent law will often address behavior that causes harm).¹⁰³ In fact, coercion may not be the best means of ensuring compliance with antecedent laws,¹⁰⁴ assuming we can even distinguish coercion from non-coercion.¹⁰⁵ Rather, Raz’s work is illuminating for its assertion that a state that values autonomy will have a compelling interest in promoting it, justifying even coercive laws as morally legitimate exer-

see also John Stanton-Ife, *The Limits of Law*, § 4, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 2.

⁹⁹ See Stanton-Ife, *supra* note 98, § 4; Waldron, *supra* note 98, at 1140-41.

¹⁰⁰ Stanton-Ife *supra* note 98, § 4 (quoting RAZ, *supra* note 12, at 418).

¹⁰¹ *Id.*

¹⁰² Waldron, *supra* note 98, at 1140.

¹⁰³ See *supra* note 16 and accompanying text.

¹⁰⁴ See *supra* note 79 and accompanying text.

¹⁰⁵ See Waldron, *supra* note 99, at 1141-52.

cises of political power. And, it follows that, if we accept Raz's argument, and if a specific body of normative antecedent law can effectively promote autonomy, then the polity will have a similar interest in it.

If successful, the claim that antecedent law can promote autonomy would help to defend the legitimacy and desirability of policies ranging from the type of no-procreation orders mentioned above,¹⁰⁶ to restrictive immigration, parental liability, and compulsory education laws. It would lead us to reject social norms that urge all citizens to procreate to maximum biological capacity (and laws that promote those norms such as public financial incentives), in favor of norms that ensure we choose to create children only in circumstances which will promote their civic quality. For example, it might standardize and enforce parental obligations to instill civic quality in their children—both as a direct and traditional law means of promoting the child's citizenship and thereby the autonomy of others in the polity, and as an indirect and antecedent law means of checking procreation by burdening the act with substantial and enforceable duties.

C. Antecedent Law as Promoting Autonomy

With this goal of promoting autonomy in mind, we can begin to assess the claim that antecedent law that seeks to promote civic quality and an optimal population range tends to promote autonomy,¹⁰⁷ perhaps more so than traditional forms of law. But first it might help to identify some of the abstract reasoning behind the claim, or three sub-hypotheses and two premises, revealed in the discussion below.

The first sub-hypothesis is that antecedent law can avoid autonomy-reducing incidents of both the violation of law and coerced compliance with it, as well as the costs (in terms of re-

¹⁰⁶ See Dillard, *supra* note 39.

¹⁰⁷ It is uncertain whether the promotion of autonomy, as a reason for official action, would be prohibited by the type of rights theory proposed by Ronald Dworkin, and explained succinctly by Jeremy Waldron in Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301 (2000), but to the extent it is distinguishable from things like racial or religious prejudices, it should not be.

ducing autonomy) of having to expend resources caring for others. The most concrete demonstrations of this claim are those cases in which courts have issued no-procreation orders, rather than no-custody orders, to neglectful and abusive parents who are adjudged unfit.¹⁰⁸ No-custody orders usually mean that any future child is born into state custody, and as such, he or she will be more likely to commit crimes than the average child.¹⁰⁹ No-procreation orders temporarily enjoin the prospective parent from having children (usually until they are fit), and therefore avoid a situation in which others must care for the child or be threatened by him, and in which he or she themselves are more likely to lose autonomy as a result of violating the law.

The second sub-hypothesis is that antecedent laws (no-growth ordinances, for example)¹¹⁰ can reduce specific losses of autonomy that inevitably arise when there are new entrants to the polity.¹¹¹ For example, introducing others into a polity di-

¹⁰⁸ See generally Dillard, *supra* note 39.

¹⁰⁹ See *supra* note 40 and accompanying text.

¹¹⁰ See Pierce, *supra* note 17, at 143:

Sustainable no-growth regulations, along with other necessary population stabilization measures, can turn the elastic relationship between population and law upside down. Sustainable no-growth controls, along with other affirmative population measures have the potential to reverse the currently expanding population. If they do reverse the trend, the need for more powerful regulations will subside. This contraction of regulation will allow individual rights to expand once again—a notion that every American can appreciate.

See also Dennis J. Herman, *Sometimes There's Nothing Left to Give: The Justification for Denying Water Service to New Consumers to Control Growth*, 44 STAN. L. REV. 429 (1992).

¹¹¹ “[T]wo thousand years of democratic theory either explicitly or implicitly presupposed that democracy could only work on a very local level.” Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 676 (2007) (citing ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* 55 (1973)). Hart argued that simple systems of unofficial rules could only obtain in small communities. See HART, *supra* note 1, at 92. For a discussion of how an increasing population threatens various rights and liberties, see Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 56-59 (2007). A loss of autonomy here is indicated by a loss of say in public decisions that can constrain one’s choices. That is not to say that population increases in a given polity cannot increase certain choices, even valuable choices, that one is given through the opportunities others create. See, e.g., Claude S. Fischer, *The Subcultural Theory of Urbanism: A Twentieth-Year Assessment*, 101 AM. J. SOCIOLOGY 543, 568 (1995) (“Urbanism probably promotes the emergence of numerous and diverse subcultures within a community.”); Thomas C. Wilson, *Community Population Size and Social Heterogeneity: An Empirical Test*, 91 AM. J. SOCIOLOGY 1154 (1986) (determining that an increase in community size can

lutes the value of one's vote, which reduces one's say in political matters, in turn reducing the degree of control one has over one's life.¹¹² Vote dilution may mean something very different in a legal system, as opposed to a political or economic system (discussed above), but this is beyond the scope of this article.

The third sub-hypothesis is that persons' ability to coordinate their actions among one another and thereby gain autonomy from successful coordination of activities is related to the number of people attempting to coordinate their actions and their respective levels of civic quality. Consider John Finnis and Joseph Raz's discussion of people coordinating their behavior to use, but not pollute, a river.¹¹³ Do their chances of reaching

increase social heterogeneity, specifically political and sexual attitudes). That said, these additional choices may not reflect additional autonomy in the sense of maintaining one's say against vote dilution, or otherwise. See HENRY DAVID THOREAU, *Walking, in THE PORTABLE THOREAU* 592, 592 (1964) ("I wish to speak a word for Nature, for absolute Freedom and Wildness, as contrasted with a freedom and Culture merely civil."). And to the extent urbanization increases crime, it reduces the autonomy laws were made to promote.

¹¹² See Rousseau, *supra* note 5, at 50-51:

Suppose the State is composed of ten thousand citizens. The Sovereign can only be considered collectively and as a body; but each member, as being a subject, is regarded as an individual: thus the Sovereign is to the subject as ten thousand to one, i.e., each member of the State has as his share only a ten-thousandth part of the sovereign authority, although he is wholly under its control. If the people numbers a hundred thousand, the condition of the subject undergoes no change, and each equally is under the whole authority of the laws, while his vote, being reduced to one hundred-thousandth part, has ten times less influence in drawing them up. The subject therefore remaining always a unit, the relation between him and the Sovereign increases with the number of the citizens. From *this it follows that, the larger the State, the less the liberty.*

....

Now the less relationship there is between private wills and the general will, that is, between mores and the laws, the more repressive force ought to increase. Therefore, in order to be good, the government must be relatively stronger in proportion as the populace is more numerous.

(emphasis added); see also *id.* at 55 ("[D]emocratic government is suited to small states . . .").

¹¹³ See Leora Batnitzky, *A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law*, 15 OXFORD J. OF LEGAL STUD. 153, 155 (1995) ("[T]he law is instrumental in setting up and maintaining schemes to motivate those who would not otherwise contribute their shares (first legal technique) but also through designating in an open and public way what the scheme is and what each has to do as his contribution to it (second legal technique), thus enabling those who are motivated by the appropriate reasons to take part in the co-operative enterprise.").

agreement fall as more persons compete for access to the river?¹¹⁴ What if, moreover, each additional person is unreasonable (the antithesis of Raz's angel)¹¹⁵ and unlikely to cooperate?

Along with theses sub-hypotheses it will help to keep two specific premises in mind, both of which may be counterintuitive. The first is that antecedent law can promote autonomy even for the subjects whose behavior it seeks to control through a form of morally defensible paternalism. This is so because it also promotes those subjects' civic quality and, in Raz's terms, eliminates morally repugnant opportunities. For example, a prospective parent subject to a no-procreation order, a teen who would become a parent but for laws discouraging teen pregnancy, or a minor subject to compulsory education arguably gains autonomy in this process.¹¹⁶ The second premise is that autonomy is measured only with regard to members of a polity. That is, to the extent antecedent law reduces the autonomy of (or opportunities for autonomy for) those outside of the polity, the reduction is not considered, though one could consider law that

¹¹⁴ See HUME, *supra* note 66, at 97 (referring to the evident benefit of rules to deal with the selfishness and confined generosity of men, Hume notes: "But when society has become numerous, and has increas'd to a tribe or nation, this interest is more remote; nor do men so readily perceive, that disorder and confusion follow upon every beach of these rules, as in a more narrow and contracted society."); ROUSSEAU, *supra* note 5, at 43 (he refers to the limits of polities "so as not to be too large to be capable of being well governed, nor too small to be capable of preserving itself on its own. . . . [t]he more the social bond extends the looser it becomes, and in general a small state is proportionately stronger than a large one. A thousand reasons prove this maxim.").

¹¹⁵ See RAZ, *supra* note 4, at 159 (discussing angels' "universal and deep-rooted respect towards their legal institutions," which allows for a sanctionless legal system).

¹¹⁶ Less extreme cases of how autonomy might be promoted by antecedent law are usually too common to notice. In 2008, residents of New Orleans evacuated the city as hurricane Gustav approached, but the evacuation was curtailed despite the dangers of returning because residents could not afford to stay out.

'It was just expensive, the whole hotel deal,' said Trevor Chase, a waiter at the Creole restaurant Dooky Chase, as he stood next to his car on Painters Street in the Gentilly section. 'We'd rather be without power.' Chase had been in Baton Rouge, Louisiana, for four days with his three children. 'We can't afford to be out like that,' he said, adding that the financial strain had 'caused a little stress on the family.'

Adam Nossiter, *Mayor Allows Residents to Return to New Orleans*, N.Y. TIMES, Sept. 4, 2008, available at <http://www.nytimes.com/2008/09/04/world/Americas/04ihtorleans.1.12892608.html>.

enhances the autonomy of those entering the polity (a child or immigrant entering in autonomy ensuring circumstances).¹¹⁷

With all of this in mind, we can return to our heuristic concepts above, using a fictitious polity to intuitively test the claim. Let us assume that persons have already left the state of nature, threatened by increasing competition for resources and a growing lack of compliance with natural law (e.g., persons murdering one another) and have come together to form Fredonia. Its citizens seek to promote autonomy, which they value highly and take as a compelling state interest, and they are fully able to enact both antecedent and more traditional forms of law to pursue that interest. They might seek to promote autonomy by constitutionalizing norms that, for example, prohibit and punish any act of violence within Fredonia, and laws that preserve vast tracks of wilderness. In passing these laws, the Fredonians will focus on constraining the behavior of all persons present in Fredonia. They will not focus on who or how many actually become present, and they will assume that all such persons are by nature—irrespective of the actual circumstances in which they are born—equally susceptible to the laws. The Fredonians are focused on the terms of the social contract, so to speak, and not on its parties.

They may think that the laws have, themselves, solved the problems of violence and threats to wilderness caused by the competition for scarce resources, even though nothing in the laws has altered the civic quality (disposition towards violence) of the citizenry or the ratio of citizens to natural resources. Much as we assume that the law, exclusively, guides judges' behavior, the Fredonians assume that, once proclaimed, the laws will determine citizens' behavior. They do not consider people's dispositions to actually follow the laws, or the increas-

¹¹⁷ See *Regulating Eugenics*, *supra* note 7, at 1582 (referring to genetic interventions "reasonably calculated to add to the possible set of life choices that the child will have or augment the child's ability to pursue her preferred life path."). The content proposed here seeks to promote a similar autonomy, albeit without genetic intervention and one more objectively valuable in Raz's terms. For a thorough discussion of promoting the autonomy of prospective children, see Dena S. Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, 28 RUTGERS L.J. 549, 592 (1997) ("The concept of the child's right to an open future offers a new way to resolve these issues by focusing on the autonomy of the child (present or future) as a limit on the autonomy of the parents.").

ing pressure created as the number of resource claimants slowly grows. Like most polities, the Fredonians are neither particularly fixated on the dissolution of their society, nor on the role of their fellow citizens' civic qualities and number in that event. They have a static and gestalt view of the "Fredonian people" as a unitary mass, rather than an atomistic view of each Fredonian (as well as prospective Fredonians) and his or her civic quality.

But, because of this limited approach and the resultant gaps in the law, there are people in Fredonia who lack even a minimum civic quality, are not susceptible to the laws, and, therefore, act violently toward others and destroy the wilderness that was set aside. The problems worsen as more persons of low civic quality become present—the law taking no particular view of their arrival. The Fredonians respond by punishing violators with increasing severity in an effort to counteract the trend—moving away from the sanctionless system imagined by Raz. But, in doing so, they reduce the autonomy of those punished and, in acting after the fact, they have failed to protect the autonomy of the victims of the crimes. Moreover, the need to punish violators, and care for and perhaps compensate the victims imposes an opportunity cost that further reduces Fredonians' autonomy. Additionally, because they are unsure whether others will respect the wilderness, law-abiding Fredonians will now compete for access, thereby undermining autonomy that was gained by passing the law in the first place. Fredonia may even choose to provisionally reduce the autonomy of all of its citizens—imposing curfews and travel restrictions, or derogating from privacy rights—to deal with the threat.

There is a similar loss of autonomy as the number of Fredonians increases, as each Fredonian's claim to the original physical subject of the contract (Fredonia) is divided, and as each one's vote, or say in matters that affect them, is diluted. Attempts to coordinate solutions to these problems are, in turn, made more difficult now that more people participate in and each person has a lesser say over the solution. Further, chaos becomes ever more probable with the constant influx of unreasonable people (the Fredonians having taken no steps to assure

the civic quality of new entrants) who are unwilling to cooperate.¹¹⁸

Admittedly, even if the Fredonians, at the genesis of their social contract, had focused on circumstances which ensure the civic quality of each new member, and focused on the ratio of members to scarce resources (or optimal number of parties to the contract), there would have been costs in terms of autonomy. Legal systems that regulate procreation, immigration, and education require the same sorts of state expenditures that systems primarily relying on *ex post* criminal sanctions do. But assuming the antecedent laws were effective, and were not so coercive as to themselves reduce autonomy,¹¹⁹ there would be a net gain in autonomy when using antecedent law. And this remains true even if we discount any gain in autonomy experienced by those subjected to the laws (e.g., a minor subject to compulsory education, a teen prevented from becoming a parent, or those benefiting from a general reduction of cultural pronatalism).¹²⁰ The autonomy cost of implementing antecedent laws is only a fraction of those incurred due to the initial failure to assure civic quality and an optimal population range.

III. THREE COUNTERARGUMENTS

Finally, it is important to consider and assess the likely counterarguments. First, as a descriptive matter, one might ar-

¹¹⁸ For an interesting discussion of the costs of enforcement in the context of international institutions, see STEINER ET AL., *supra* note 81, at 716 ("The more severe the enforcement problem, the more restricted the membership. When actors face an enforcement problem (that is, when individuals do not have an incentive to voluntarily contribute to group goals), collective action is problematic. Moreover, the severity of the enforcement problem increases with the number of actors" (quoting Barbra Koremenos et al., *The Rational Design of International Institutions* 55 INT'L. ORG. 761, 783 (2001))).

¹¹⁹ For example, a polity might choose withdrawal of official charters for businesses that violate immigration laws rather than increased removal of persons, or vicarious parental liability laws rather than population quotas. However, for a discussion of the difficulty of eliminating coercion even in structural changes to the law, see Waldron, *supra* note 98, at 1141-52.

¹²⁰ This article will not discuss the full argument, but there is possibly a gain in autonomy as persons migrate from a primarily personal or agent-relative morality focused on one's biological counterparts, to one more inclusive of impersonal or agent-neutral (utilitarian, for example) morality. For a discussion of personal and impersonal morality, see NAGLE, *supra* note 30, at 164-88.

gue that states (perhaps the United States) can and do exist without antecedent law, that is, that antecedent law cannot be distinguished from traditional law. The second is a normative argument. It acknowledges that the form exists but argues that the state should minimize any influence it has through law on the creation and quality of persons within it. The third argument also admits that the form exists but argues that the state should fashion a particular content, or substantive antecedent law that is antithetical to the content proposed in Part II.

A. Antecedent Law Need Not Exist

As to the first counterargument, when a state grants child tax credits, regulates marriage, regulates contraception and abortion, regulates immigration, or standardizes aspects of education, it influences the number and quality of persons within it.¹²¹ It would be a mistake to think that only states with explicit family planning policies, like the PRC, regulate their demography, while states, like the United States , with more subtle policies do not; it would also be a mistake to think that states like the PRC must rely on constant coercion to do so.¹²² Moreover, even if a state uses its authority to protect broad procreation or immigration rights against legislation that might limit them, it is still actively influencing the size and composition of its constituency. For example, when a court overturns a local no-growth ordinance, it enables the influx of new members the citizens sought to prevent; it imposes its own outcome over the more democratic one, the one chosen by the citizens.

¹²¹ For a description of various population policies in the United States, see Mona L. Hymel, *The Population Crisis: The Stork, the Plow, and the IRS*, 77 N.C. L. REV. 13, 15-18 (1998) (discussing pronatal United States tax law); Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 490-92 (1995) (discussing the history of pronatalism in United States law); LARRY D. BARNETT, POPULATION POLICY AND THE U.S. CONSTITUTION, ch. 3 (1982) (providing an extended discussion of United States law and demography).

¹²² See, e.g., Yilin Nie & Robert J. Wyman, *The One-Child Policy in Shanghai: Acceptance and Internalization*, 31 POPULATION DEV. REV. 313, 313-36 (2005) ("The one-child family is considered normal; few are still concerned with the policy per se, while others see it as unnecessary. The one-child policy seems to reflect Shanghainese current preferences; its status as a legal requirement may be largely irrelevant."); Baochang, *supra* note 80, at 145 (finding that "government-mandated fertility and achieved fertility have converged in China").

Similarly, when a state tries to take its hand off the reins and have no antecedent law at all, it may merely reinforce, by tacit agreement, the behavioral norms which exist and past laws helped shape.¹²³ If a state once promoted pronatalism to build its armies or its workforce, the decision to switch to a rhetoric, unaccompanied by regulation, of reproductive rights does not reverse the trend; it simply shifts state policy into neutral and allows the state to coast forward on its existing path.¹²⁴ The sea of dicta emphasizing reproductive freedom in the United States¹²⁵ is of little help when in terms of cultural norms “a couple must normally choose *not* to have a child.”¹²⁶ This is the extant pronatal cultural preference that is fostered by law.

The United States has one of the highest fertility rates in the industrialized world. It also has a one thousand dollar per

¹²³ “Reproductive regulation cannot be separated from the vision of woman as mother, which is its genesis . . .” Abrams, *supra* note 121, at 456. Abrams refers to “the pronatalist message of religion, philosophy, and politics and its manifestation into law” and finds that, even in the modern reproductive rights precedent, pronatalist norms are reinforced. *Id.* at 456, 483-91; see also M.A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, 20 HASTINGS CTR. REP. 6, 6 (1990) (“From a feminist perspective, unlimited procreative liberty risks treating children as property, distorts understanding of the family, and neglects moral concerns about how we reproduce.”). By not refuting pronatalism, even seemingly neutral legal doctrines fail to rebut this status quo. Cf. STEINER, *supra* note 81, at 176 (“Legal norms capture and reinforce deep cultural norms and community practices. They entrench ideas and help give them the sense of being natural, part of the inevitable order of things.”); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1605 (2000) (“Of course, no one believes that the only way that the state ever influences the behavior of its citizens is through the incentive effects of legal rules. Quite clearly, the state sometimes influences behavior by shaping preferences rather than by constraining opportunities.”); ROUSSEAU, *supra* note 5, at 95 (“Among all the peoples of the world, it is not nature but opinion which decides the choice of their pleasures. . . . Although the law does not regulate mores, legislation is what gives rise to them.”).

¹²⁴ Purdy argues that promoting a broad version of reproductive autonomy in certain circumstances will have pronatal consequences, increasing fertility rates. See *generally* Purdy, *supra* note 9, at 940-54.

¹²⁵ See, Dillard, *supra* note 111, at 15-20. In a display of the pronatalism Abrams identifies, that particular dicta—mostly arising in cases dealing with the right *not* to procreate—has been read as a constitutional rule protecting an absolute right to procreate. See, e.g., *State v. Oakley*, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting) (“Men and women in America are free to have children, as many as they desire. They may do so without the means to support the children and may later suffer legal consequences as a result of the inability to provide support.”).

¹²⁶ Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1870 (1971) (emphasis added).

child tax credit and other pronatal institutions,¹²⁷ as well as a Supreme Court that has treated, in pervasive dicta (often repeated by commentators), *both* procreation and contraception as coextensive fundamental privacy rights.¹²⁸ The United States aside, those polities representing the largest populations in the world have all, at one time or another, explicitly regulated procreation.¹²⁹ It seems unlikely that states do, or even can, avoid influencing the presence and civic quality of their constituents.

B. Antecedent Law Should Not Exist

The second counterargument holds that a state should minimize antecedent law because it interferes with privacy rights and/or autonomy and is therefore inherently illiberal.¹³⁰ Advocates of this view claim that having a child is a private or autonomous act. But that certainly might come as a surprise to the

¹²⁷ Leonard E. Burman & Laura Wheaton, *Who Gets the Child Tax Credit?* TAX NOTES at 387-93 (Oct. 17, 2005) (citing the Joint Committee on Taxation, *Estimates of Federal Tax Expenditures for Fiscal Years 2005-2009* (Joint Committee Print JCS-1-05, Washington, DC: US Government Printing Office)). For example, a recent draft Health and Human Services Department regulation defines certain forms of contraception as abortion making access to them more difficult. See Bob Egelko, *Bush Plan Would Blunt State Birth Control Law*, S.F. CHRON., Aug. 21, 2008, at A1.

¹²⁸ See Dillard, *supra* note 111, at 15-20.

¹²⁹ See *id.* 35-37.

¹³⁰ See generally Eichner, *supra* note 23; Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1039-41 (1996). Sen is an eloquent proponent of a broad procreative right and defender of the inviolability of the familial realm. For a rebuttal to Sen's characterization of the right and inviolability of the realm, see generally, Dillard, *supra* note 111. Furthermore, Sen has argued that any encroachment on the realm can result in a net loss of autonomy. Sen states:

A case for state intervention in fertility decisions is sometimes derived from a diagnosis of "externalities": a family's decision to have one more child could affect the interests--or for that matter the sense of propriety--of other people. This diagnosis can be used to advocate many different policies, from changed price incentives through taxes and governmental subsidies to legal and other restrictions on the family's reproductive decisions. This easy "translation" of interventionist arguments, from standard cost-benefit analysis to family planning, needs close scrutiny. As discussed above, we cannot but see family planning as a rather private subject in which—to use Mill's phrase—there is "no parity" between the family's own direct involvement and those of others. . . . This is not an argument to ignore all else, but that "all else" has to be very powerfully contrary to outweigh the general presumption in favor of leaving reproductive behavior to the family in general and to the woman in particular.

Sen, *supra*, at 1049-50 n.41.

person born, and, unless parents plan to keep their child in a cage, the persons with whom the child will interact—and whose lives she will inevitably affect.¹³¹ If not the state, then who should be responsible for the presence and civic quality of the polity? Does it really make sense to ignore these issues entirely? Is not the history of procreative freedom also the history of bad parenting and its consequences?

When we aggregate all acts of procreation in a given period of time, the impact of those acts can be seen even more clearly as “public.”¹³² Considering that even a single act will project its effects through all future descendants, procreation may be the *most public* act in the average citizen’s life.

Moreover, there is nothing in the *form* of antecedent law that is itself illiberal, nor is it illiberal for the state to seek to maximize autonomy. Similarly, the particular substance or content of antecedent law enacted to achieve that end would not be illiberal, as long as its means were not so coercive as to be counterproductive (autonomy reducing) or to violate legitimate rights. As shown in Part II, antecedent law as a form can promote autonomy *more* than traditional forms of law. This is a view with which some proponents of a broad procreative right, like Amartya Sen, might agree, even though they would choose a different means.¹³³

A variant to the second argument treats antecedent law as a form of social engineering that is undemocratic. “It is axiomatic to liberal democracy that the governed should choose the gov-

¹³¹ For a discussion of the interpersonal aspects, or negative externalities, of procreating, see Dan Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377 (2005). John Stuart Mill, referring to the moralities of justice that prevent harming others or hindering their pursuit of the good, said that “[i]t is by a person’s observance of these that his fitness to exist as one of the fellowship of human beings is tested and decided; for on that depends his being a nuisance or not to those with whom he is in contact.” MILL, *supra* note 40, at 60. Rousseau refers to the civil religion as “sentiments of sociability, without which it is impossible to be a good citizen or a faithful subject.” ROUSSEAU, *supra* note 5, at 102.

¹³² See Brock, *supra* note 1310, at 378 (“It is widely recognized, both in history and in political theory, that the effect of many individual decisions, themselves each rational and justified as individual choices, may be collectively undesirable for a group or society.”).

¹³³ See Sen, *supra* note 125, at 1061 (arguing in part that promoting education can reduce fertility, enhance freedom, and be “the ‘solution’ to the population problem”).

ernment, not vice versa. . . . Any attempt to directly influence the composition of future generations amounts to the state's choosing the governed, and that is not acceptable in a liberal democracy."¹³⁴ Under this argument the state should play little if any role, and the parents should have plenary authority—even to the point of engaging in genetic enhancement of their children.¹³⁵ The argument may be premised on the assumption (very much like the first counterargument) that, because at some point in history people formed the state and its first laws, the role of who makes whom can never be reversed. But that aside, there are at least three responses.

A democratic regime is an artificial entity made to represent each citizens' individual interests.¹³⁶ The governed choose the government, which then affects the governed. Do the governed have an interest in who one another other is, in whom they share the polity? Does one care about whom one is in social contract with, or just about the terms of that contract? Why should one not have a say in something that affects one so deeply as the determinants of the polity around one, and thereby the laws one will be subject to? In a democratic polity, each citizen relies on all other citizens to determine the government and the economy, in short, the state of affairs, including antecedent law. If antecedent law is created through a democratic process there is nothing undemocratic about it; to leave it wholly to the realm of the family, in the name of preserving privacy rights, would be far more undemocratic.

Moreover, leaving it to the private realm of family life does not necessarily protect liberal values. The citizens are generally not constrained by constitutional limits, such as a prohibition on practicing or teaching discrimination, whereas the state is. Avoiding antecedent law also prevents the state from actually

¹³⁴ *Regulating Eugenics*, *supra* note 7, at 1596-97.

¹³⁵ *See generally id.* (arguing that liberal eugenics, in which parents modify genetic makeup of their children so as to enhance their life choices, is best understood as a fundamental right).

¹³⁶ *See* Joseph Raz, *Rights and Politics*, 71 *IND. L. J.* 27, 35 (1995) ("The public interest is, and is generally taken to be, a function of individual interests."); HOBBS, *supra* note 32, at 138 (explaining that persons "have made an artificial man, which we call a commonwealth").

promoting liberal values. An antecedent approach to civil rights law acknowledges that some in the polity recognized and respected civil rights before formal civil rights laws were ever promulgated, and avoids presuming that secondary-type laws that constrain racist behavior suffice. Treating racism as an absence of civic quality, antecedent law could promote autonomy by preventing the creation of racists—intensively targeting specific communities where education—whether at home or in school—was lacking or contrary to civil rights norms.

The second response is that, as all will admit and as one opponent to antecedent law stated, “although we accept a certain amount of molding as necessary for society to function, we accept only that amount that is necessary.”¹³⁷ In other words, *both* the state and parents inevitably make choices that help determine the presence and civic quality of persons in the polity—whether they want to or not. And once the door is open, determining what it means for “society to function” and what is “necessary” is not an easy matter. Yet, it is better to task the state with this responsibility than to leave it to parents who are unelected, unrestrained by constitutional prohibitions, not obligated to be transparent and accountable in their dealings, and not necessarily mentally fit.

Third, the fear of social engineering, as described by opponents of antecedent law,¹³⁸ seems to be partially based on the threat it poses to pluralism, i.e., the states ability to impose a comprehensive concept of the good.¹³⁹ However, civic quality, as defined above, on all points of its spectrum, is not a comprehensive concept of the good or a moral doctrine. It is more akin to the “public civility” that Rawls advocates to ensure a minimum environment where pluralism can flourish.¹⁴⁰ We can return to the example of academia. University law (itself analogous to antecedent law) is first about exclusion of those incapable of composing themselves in a manner conducive to the beginnings of a well ordered society that ensures pluralism.

¹³⁷ *Regulating Eugenics*, *supra* note 7, at 1598 (referring to compulsory education).

¹³⁸ *See generally Regulating Eugenics*, *supra* note 7.

¹³⁹ *See id.* at 1596 (“The real trouble with eugenics is not that it can be coercive; it is that the state can use it to create the citizens it wants to govern.”).

¹⁴⁰ RAWLS, *supra* note 24, at 92.

C. Promoting Values Other Than Autonomy

The third, final, and most insidious counter-argument admits that antecedent law exists, but argues for contents antithetical to those suggested in Part II. It is here that proponents of eugenics have historically made their claims, and in reaction to them we might have thrown away the entire form of antecedent law just to be safe.¹⁴¹ That would have been a mistake. Eugenics involves, by necessity, genetics.¹⁴² Antecedent law, as a form, has no necessary relation to genetics or biology. Here the form and content distinction is vital.

The form focuses on how law determines presence and thus civic quality. This form can be used to explicitly reject any underlying value, or state interest, in genetic attributes per se, including the value of adding more or fewer persons of a particular race or genetic makeup.¹⁴³ Again, we can do so because it seems likely that genetics or biology have nothing to do with civic quality, and that the relevant attributes can be instilled in anyone through upbringing and education. And if we are going to reject eugenics we may choose to do so fully, regardless of whether it is pursued by the polity or by its members.¹⁴⁴ In doing so, we could reject the very act of determining who should

¹⁴¹ Commentators certainly seem wary of any law that explicitly controls the presence and quality of persons in a given polity. See, e.g., *Regulating Eugenics*, *supra* note 7; see also Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541 (1998); Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMAN. 181 (2005). Admittedly the PRC's family planning regime—a key example of antecedent law—has involved segregable instances of eugenics, see GREENHALGH *supra* note 46, at 217, though as noted in Part III, this is something that antecedent law as a form can explicitly and effectively reject.

¹⁴² See *Regulating Eugenics*, *supra* note 7, at 1579.

¹⁴³ This would include the type of pronatal quasi-eugenics hinted at by some proponents of increased fertility rates. See, e.g., Russel Shorto, *No babies?*, N.Y. TIMES MAGAZINE, June 29, 2008, at 2, available at <http://www.nytimes.com/2008/06/29/magazine/29Birth-t.html?ref=world> ("The fears on the right are of a continent-wide takeover by third-world hordes — mostly Muslim — who have yet to be infected by the modern malady called family planning and who threaten to transform, if not completely delete, the storied, cherished cultures of Western Europe.").

¹⁴⁴ See, e.g., *Regulating Eugenics*, *supra* note 7. Note though, that the liberal eugenics defended in that work, *id.* at 1582, namely those which seek to enhance autonomy, are very different from the sort of pronatal quasi-eugenics proposed to stave off the "third world hordes" referred to above.

be present in the polity or attempting to influence our collective civic quality with reference to genetics.¹⁴⁵

Another type of antecedent law that might be rejected is one that values the mere production of human life per se and pursues it as an end in and of itself.¹⁴⁶ In this case, if we agreed that the mere production of more human lives was not valuable, we would reject laws premised on that value.¹⁴⁷ Antecedent law allows us to reject these things, this content, without rejecting the form itself, and losing its ability to promote other values.

These types of substantive antecedent law, at least in the foreseeable future, do not pose the greatest threat to the type of autonomy states like Fredonia value. Rather, the greatest threat may be posed by another substantive antecedent law, perhaps dominant today, a type of pronatal nationalism.¹⁴⁸ This pronatal nationalism values primarily the military and economic strength of a nation, as well as its "growth" (and growth in literal terms, as opposed to human betterment)¹⁴⁹ as ends in and

¹⁴⁵ Of course, there are pressing questions regarding how a state like the United States could regulate the conduct of prospective parents in this regard absent state action. They will not be discussed here.

¹⁴⁶ Some commentators take this view, though they often proceed from religious conviction. "The right to procreate goes back to the very beginning of time, and is part of our very nature. 'Be fruitful and multiply,' it should be recalled, was the first commandment given to our first parents." Steven W. Mosher, *People of Faith Beware: The Left has Decided that There is no Right to Have More Than One Child*, CATHOLIC EXCHANGE, July 31, 2008, <http://www.catholicexchange.com/2008/07/31/113314/>. Mosher also argues from an economic perspective. See *infra* note 153 and accompanying text.

¹⁴⁷ Ronald Dworkin has argued that valuing life in this way is essentially religious and, therefore, outside of the state's interest. RONALD DWORKIN, *LIFE'S DOMINION* 155-68 (1993); see also Francis Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160, 164 (reviewing RONALD DWORKIN, *LIFE'S DOMINION* 155 (1993)) (Kamm refers to Dworkin's argument that "[s]ome intrinsic value is incremental value; that is, the more there is of what is valuable, the better. The sacred is nonincremental value: that something sacred is valuable is not reason to produce more of it, but is reason to treat what exists of it properly.").

¹⁴⁸ Note that there is a thin distinction between pronatal eugenics and pronatal nationalism, which may overlap depending on the pronatalist's view of what sort of humans need to be produced. Again, defining the fundamental procreative right as self-replacement would allow states to prevent would-be pronatal nationalists from breeding in pursuit of national supremacy.

¹⁴⁹ As an alternative, one can view human betterment as only beginning with security, but proceeding towards higher levels of human development. See, e.g., ABRAHAM HAROLD MASLOW, *MOTIVATION AND PERSONALITY* 80-106 (1954) (setting forth Maslow's theory of a hierarchy of human needs in which security is merely something on which to build).

of themselves.¹⁵⁰ It seeks to produce economic and political persons rather than legal persons, either ignoring or presuming their susceptibility to law, their civic quality.

Referring to state interests in regulating abortion, Justice Stevens said that the state "may also have a broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life."¹⁵¹ What Justice Stevens describes is antecedent law that treats prospective members of the polity as specific (and perhaps non-consenting) means to the state's or other citizens' ends, rather than as ends in and of themselves, or as people whose autonomy we seek to promote.

The following quote illustrates this kind of antecedent law:

When fertility drops below national replacement levels, the number of productive workers likewise falls. . . . And in these terror-ridden times, it is not only the economy that nosedives with fewer workers, but national defense. . . . And while high technology may replace some of the foot-soldiers, the money for such is being diverted to pension benefits. . . . 'Does this mean that the future belongs to those who believe they are (or who are in fact) commanded by a higher power to procreate? Based on current trends, the answer appears to be yes. . . . Today, however, it has become clear that no law of nature ensures that human beings, living in free, developed societies, will create enough children to reproduce themselves.'¹⁵²

¹⁵⁰ Contrast such a view with that suggested by Rawls. Referring to the difference principle not requiring continual economic growth he finds "[w]e certainly do not want to rule out Mill's idea of a society in a just stationary state where (real) capital accumulation may cease." RAWLS, *supra* note 24, at 159.

¹⁵¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 915 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

¹⁵² Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 658 (2005) (quoting Phillip Longman, *The Global Baby Bust*, FOREIGN AFF., May/June 2004, at 64). For a discussion of a very particular form of biopolitics that seeks to use reproductive autonomy to avoid sub-replacement fertility rates, see Purdy, *supra* note 9.

This view is not novel, nor limited to procreation.¹⁵³ As one author recently opined in advocating for increased immigration, “Maintaining the United States global economic and military supremacy is inextricably interwoven with a growing population.”¹⁵⁴ Where is the notion of civic quality in this? While World War II was under way in Europe, scholars in the United States expressed the state’s economic and military interest in adding persons to the polity by suggesting that immigration could take up the slack where domestic fertility left off.¹⁵⁵ Today, some proponents of expanding the military advocate offering United States citizenship, regardless of one’s current immigration status, in exchange for military service.¹⁵⁶ According to this view of antecedent law, the polity’s prospective members are future soldiers, laborers, childbearers, taxpayers, and consumers,¹⁵⁷ not

¹⁵³ This value, or a fear of foreign invasion, most likely led Rousseau to equivocate as to whether a polity should limit the size of its population. See ROUSSEAU, *supra* note 5, at 43-48, 66-67. He also may have premised the claim on a state’s ability to export excess persons to colonies. See *id.* at 45.

¹⁵⁴ Fernando Espuelas, *Why the U.S. Needs More Immigrants*, HUFFINGTON POST, May 4, 2010, http://www.huffingtonpost.com/fernando-espuelas/why-the-us-needs-more-imm_b_562425.html.

¹⁵⁵ See A.H. Feller, Book Review, 50 YALE L.J., 949 (1941) (reviewing GUNNAR MYRDAL, *POPULATION: A PROBLEM FOR DEMOCRACY* (1940)).

¹⁵⁶ See Jeff Jacoby, Op-Ed., *Through the Military, A Path to Citizenship*, BOSTON GLOBE, Feb. 13, 2008, at A13. Admittedly, the autonomy of any polity’s members might be contingent on successfully defending the state against foreign invasion. However, that argument is contingent on an accurate empirical assessment of the actual threat to the polity, and should not ignore means other than antecedent law for addressing (or reducing) the threat.

¹⁵⁷ Longman, *supra* note 152, at 69-70, 78:

A nation’s GDP is literally the sum of its labor force times average output per worker. Thus a decline in the number of workers implies a decline in an economy’s growth potential.

...

Current population trends are likely to have another major impact: they will make military actions increasingly difficult for most nations. . . . Given their few sons, it is hardly surprising that Russian mothers for the first time in the nation’s history organized an antiwar movement, and that Soviet society decided that its casualties in Afghanistan were unacceptable.

...

Education should be a lifetime pursuit, rather than crammed into one’s prime reproductive years.

For another read on population and economic development see, HERMAN E. DALY, *THE ECONOMICS OF SUSTAINABLE DEVELOPMENT* 1 (1996). Daly refers to sustainable devel-

autonomous would-be-members whose civic quality we promote. "Population growth is a multiplier of wealth . . . the more minds you have at work, generally the better off you are; human beings are the ultimate resource, the one resource you cannot do without."¹⁵⁸

As Karl Polanyi described, this is a view of humans as a resource *themselves*, or "complete agreement on the desirability of a large population . . . [And] ready agreement on the advantages of cheap labor."¹⁵⁹ It is a view that has led polities like the United States to a position where it may not fare well in an assessment of the civic qualities of its constituents.¹⁶⁰ The view is commonly expressed through pronatalism, but also through viewing the immigration law of a state primarily in relation to the state's economy.

Education too is not, from this perspective, treated as an end or value in itself, or valued for its ability to increase civic quality or autonomy. Rather, it is desirable primarily because it can increase gross domestic product. William Easterly, for one, sees little value in the increasing levels of education throughout the world over the past several decades, citing one particular study that found "no positive association between growth in education and growth of output per worker."¹⁶¹ Longman's view is that "education should be a lifetime pursuit, rather than crammed into one's prime reproductive years" and is premised on a very particular view of prospective members of the polity.

opment as resisted by "most economic and political institutions" which are founded on traditional quantitative growth and fear its replacement by something as subtle and challenging as qualitative development. *Id.* Of course, it may also be that these institutions have vested interests in avoiding replacing growth with qualitative development, such as an industrialist relaying on the availability of cheap labor and greedy consumers.

¹⁵⁸ *Economy's Reaction to a Growing Population* (Fox Business television broadcast Aug. 14, 2008), available at <http://www.foxbusiness.com/video/index.html?referralObject=3029763> (quoting Steven W. Mosher of the Population Research Institute); see also WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* 94 (2001) (referring to the genius principle which, loosely stated, posits that the more babies born, the greater the likelihood that one of them will grow up to be a genius capable of solving the world's problems—like overpopulation).

¹⁵⁹ KARL POLANYI, *THE GREAT TRANSFORMATION* 109 (1944).

¹⁶⁰ See *supra* note 86.

¹⁶¹ See EASTERLY, *supra* note 158, at 73-78.

In contrast, scholars who value autonomy tend to treat “children primarily as future citizens, belonging to their communities and their nation” and to view “state regulation of education, labor and maltreatment as justified by the state's interest in children's welfare and in their growth to autonomous citizenship.”¹⁶²

Moreover, education, in the pronatal nationalist and economic growth model, promises a narrow version of autonomy through personal material accumulation,¹⁶³ rather than a prerequisite to one's membership in the polity. It is part of what Polanyi called the “ascendancy of economics over politics proper.”¹⁶⁴ Members of the polity are primarily economic producers rather than political constituents. In this view, a polity that consisted of a small population of highly educated and empathic citizens of high civic quality, but that had few riches and little military might, would be worthless. This is a view of persons as political or economic, and not necessarily legal.

Under the pronatal nationalist view, in direct opposition to the substantive antecedent law proposed here,¹⁶⁵ each member views new members of the social contract in terms of their potential usefulness, and assumes their behavior is guided by power (coercion) or material incentives and disincentives (indeed, this particular view of ourselves is promoted). The polity's¹⁶⁶ value is determined by its gross domestic product and

¹⁶² Barbara Bennett Woodhouse, *Child Abuse, The Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479, 482 (2001).

¹⁶³ “A purely materialistic motivation for getting an education is now the norm, not the exception.” Victor E. Ferrall Jr., *Can Liberal Arts Colleges Be Saved?*, INSIDE HIGHER ED., Feb. 11, 2008, available at <http://www.insidehighered.com/views/2008/02/11/ferrall>.

¹⁶⁴ POLANYI, *supra* note 156, at 119.

¹⁶⁵ Again, the purpose of this article is only to introduce the concept of antecedent law, but readers may find that something like compulsory university-level education would not be inconsistent with the content suggested in Part II, while a state paying its citizens to procreate in order to build its military and economic strength would be. Though there is nothing prejudicially antinatal in the substantive antecedent law proposed here, the substantial resources required to ensure the autonomy of each new person, as well as the finite nature of all polities, makes it tend in that direction—at least relative to current fertility rates worldwide.

¹⁶⁶ Arguably, we need not worry about the civic quality and autonomy of new members of the polity, because we can simply divide off into sub-polities that have their *own* exclusionary antecedent laws ensuring minimum civic quality and optimal population ranges, such as modern gated-communities or even individual families holed up on private tracts of land. We might even argue that trying to impose civic quality and optimal

military might rather than the civic quality and autonomy of each citizen.

CONCLUSION

In pursuit of certain values, such as military and economic might, states may choose to fill themselves with as many persons as possible, irrespective of their civic qualities, as one of the first orders of business. But as external threats to states subside, they may reach a point where doing so is not necessary and where the costs outweigh the benefits. States may also choose to do so because they view the mere production of human life as per se valuable, because they view massive populations as deterring the effectiveness of internal factions,¹⁶⁷ or for any number of other reasons. But whatever the reason, we should be sharply aware of the role the law plays in this process because it is that process which shapes the basic state of legal affairs that lawyers must work within. As an express concept, the form antecedent law can ensure that when we think of law, we consider the number and capabilities of those subject to it, how they came to be, and how other persons subject to it will come to be in the future.

population requirements through government is applying a comprehensive conception of the good, which per Rawls, is fitting only for a voluntary association or community and not the polity as a whole. See RAWLS, *supra* note 24, at 4, 10-11, 20-21. But it may be that individuals enter sub-polities to escape members of the broader polity who they believe lack minimum civic quality, rather than to voluntarily associate, in Rawlsian terms, around some shared comprehensive conception of the good. Importantly, exclusionary antecedent law used in this way by the sub-polity, differs from that imposed by the government on the general polity, in that it exclude persons already within the polity, not potential future members. If this is the case, the sub-polities units are not the type of voluntary associations that Rawls may have had in mind, and by turning their back on the polity and seeing its constituents as merely useful workers and soldiers, the members of these associations, themselves, seem to lack the type of empathy with their fellow citizens that is characteristic of higher civic quality.

¹⁶⁷ Referring to the Framers' attempts to use federalism to avoid faction influence one commentator notes, "Contemporary observers confirm the fact that 'the smaller the population and geographic area, the greater the likelihood of dominance by a single political party or machine with a single set of mores and the greater the opportunity for aggregation of economic power to overshadow the political scene.'" John Denvir, *Justice Rhenquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011, 1038 (quoting J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 252 (1980)). Using antecedent law to disable factions from doing evil may also disable ordinary citizens from doing good.

Antecedent law may also help us to consciously choose the values we pursue. As a result, we might choose autonomy as a value rather than military or economic might, and we might choose to view the polity more like a university, intent on promoting the civic quality of each citizen, rather than as a dominant military force or a productive factory. Today we use the term “civil society” to refer to those members and institutions that comprise a sub-unit of the polity and who possess and act on certain civic qualities, but there is no reason why any member of a polity should ever have come to exist outside of its civil society—in a Lockean sense—in the first place. Political identity may best be found in the civic quality of each person that inhabits a state—and whether by action or omission, it is the law, as much as any other creator, that puts them there.

Rawls said that our “social world might have been different and there is hope for those at another time and place.”¹⁶⁸ Lawyers who wish to change the world might first consider the type of antecedent or background law that makes the world—by which we really mean the crowd of people we have to share it with—susceptible to change.

¹⁶⁸ RAWLS, *supra* note 24, at 38.



RIGHTS GONE WRONG: THE FAILURE OF FUNDAMENTALIST TORT THEORY

Dr. Tim Kaye*

I. INTRODUCTION

It is often said that the law of torts is in crisis. Indeed, it has become somewhat common to observe that it is currently going through its third crisis, at least as regards medical malpractice.¹ Whether this crisis is real or manufactured is, of course, a matter of some debate.² Yet within academic—and perhaps also some appellate court—circles, it certainly appears that there is significant disquiet about the current state of tort law theory.³ The hegemony of the economic approach to tort law is coming under repeated attack⁴—especially from those who favor corrective justice—while new devotees seek to shore it up and remold it so as to enable it more effectively to withstand these challenges.⁵ For perhaps the first time in thirty years, no one school of thought appears to hold sway—a point clearly illu-

* Professor, Stetson University College of Law, Florida. I should like to thank my Stetson colleagues for creating such a collegial and non-fundamentalist environment, and especially Bob Bickel and Ellen Podgor for their differing brands of encouragement and words of wisdom.

¹ See, e.g., Mimi Marchev, *The Medical Malpractice Insurance Crisis: Opportunity for State Action*, 2002 NAT'L ACAD. FOR ST. HEALTH POL'Y 4, 4, available at http://www.nashp.org/sites/default/files/medical_malpractice_crisis.pdf.

² Compare Lawrence Chimérine & Ross Eisenbrey, *The Frivolous Case for Tort Law Change: Opponents of the Legal System Exaggerate its Costs, Ignore its Benefits*, 2005 ECON. POL'Y INST. 1, 6, available at http://epi.3cdn.net/27399496d31825244f_wgm6bx18j.pdf (rejecting the idea of tort law being in a crisis), with F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 524 (2006) (arguing that various societal factors contribute to the currently lamentable state of tort law).

³ See, e.g., Nicholas J. McBride, *Duties of Care--Do They Really Exist?*, 24 O.J.L.S. 417, 419 (2004); Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, in EXPLORING TORT LAW 262, 294 (M. Stuart Madden ed., 2005).

⁴ See, e.g., Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145 (2003); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1843 (2004).

⁵ See, e.g., Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501, 1502 (2006).

strated not only by the deep divisions within the American Law Institute⁶ over the proposed Third Restatement of Torts,⁷ but also by the strangely convoluted and often apparently self-contradictory text of that rather overblown document.⁸

Politicians like to argue that the battle lines in the "torts crisis" are currently drawn between two camps: on the one side, those in favor of so-called "tort reform" in the interests of American society or, more specifically, the American economy; and on the other, those in favor of the downtrodden "little guy," whose rights are all too easily infringed by powerful organizations and institutions. In reality, of course, we all know that the issues raised by the law of torts are so complex that there are actually many more points of view than are permitted by this simplistic dichotomy. Yet, for some reason, it remains fashionable among American tort law theorists to assert that all scholars must side with one of two camps.⁹ Even such distinguished theorists as Ernest J. Weinrib¹⁰ and Richard W. Wright,¹¹ both of whom favor corrective justice, have fallen prey to this peculiar phenomenon. The latter has asserted, for example, that:

[A] successful normative and descriptive theory of law should at least be able coherently to explain and justify the principal features of the existing law. Only a monistic foundational theory holds out any prospect of being able to do so.

The two principal monistic theories of law are (1) utilitarian efficiency theory, based on the foundational norm of maximizing aggregate social welfare, which asserts that the purpose of tort law is and should be *efficient* compensation and de-

⁶ See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 664 (2001).

⁷ See generally RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (Tentative Draft No. 5, 2007).

⁸ See Stapleton, *supra* note 3, at 269.

⁹ Professors Goldberg and Zipursky are among the relatively few who have refreshingly refused to fall into this trap. Goldberg has plausibly identified five broad schools of thought on tort law within the industrial era, and yet still admits that those within each school often disagree with one another. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514 (2003).

¹⁰ See generally, ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 145 (1995).

¹¹ See generally, Richard W. Wright, *Right, Justice, and Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (David G. Owen ed., 1995).

terrence, and (2) the Kantian-Aristotelian theory of Right or justice, based on the foundational norm of equal individual freedom, which asserts that the purpose of tort law is and should be *just* compensation and deterrence.¹²

This assertion of a binary division within tort law scholarship has tended not to be so fashionable in England.¹³ However, a recent book by English law professor, Robert Stevens, suggests that this malaise has now crossed the Atlantic.¹⁴ Like Weinrib and Wright, Stevens sees tort theorists as belonging to one of two camps, although his own asserted dichotomy is a little different from Wright's. Stevens conceives of a cleavage between, on the one hand, those who consider tort law to be concerned with loss and its consequences and, on the other, those who believe that it is about the protection of rights. As the latest example of the tendency among scholars to assert a binary division in tort law theory, Stevens's "twist" to this dichotomy arguably takes this approach to even greater extremes than his predecessors. It is difficult to find anyone else who believes, for example, that there really should not be any such thing as the tort of negligence.¹⁵ Indeed, rather than shedding new light on the law of torts, all these "with-me-or-against-me" approaches have one unappealing feature in common: they paint a picture of the law which is simply unrecognizable to the non-believer.¹⁶ Herein lies the problem. Instead of aiding the explanation or evaluation of the law of torts, statements of tort law theory are becoming more like affirmations of fundamentalist religion, in which theorists flaunt their piety by providing an ever-purer statement of the faith. Yet, as always, fundamentalist piety appeals only to fundamentalists.

This point of the article is not to argue with the set of values which underlie each fundamentalist version of tort law theory. That has been done many times before but has probably

¹² *Id.* at 160.

¹³ See, e.g., Peter Cane, *Justice and Justifications for Tort Liability*, 2 O.J.L.S. 30, 30 (1982) ("A[n] . . . approach, common among English writers, sees the law of torts as based on a number of different theories. . .").

¹⁴ ROBERT STEVENS, *TORTS AND RIGHTS 2* (2007).

¹⁵ *Id.* at 296, 303.

¹⁶ See Stapleton, *supra* note 3, at 266-68.

had less effect than might be imagined. Partly this is because critiques of one group of fundamentalists are often made by the fundamentalists of another group. Partly it is because fundamentalists are almost bound to pay no attention to criticism, so that the only audience prepared to listen is comprised of those who are already skeptical. This article, by contrast, is interested in taking the fundamentalist claims on their own terms and subjecting them to an immanent critique. In other words, this article is interested in exploring whether rights-based and economics-based fundamentalists actually make sense according to their own statements of faith. It concludes that they do not. Those who advocate them have often seriously misunderstood their own theories, resulting in theories which paint a rather mystical account of the law.

Part II of this article treats Stevens's book as a case study in the flaws of fundamentalism. It demonstrates, in particular, how fundamentalism blinds theorists to what the law actually says. This blindness takes on two manifestations. The first involves failing to notice that countries which have similar laws, such as Australia, Canada, England and the United States, nevertheless do not have the same laws. Indeed, the point seems obvious, especially within the United States, where each state has its own body of tort law—and yet so much modern theory overlooks it. Stevens's fundamentalism makes him so oblivious to this fact that, although he focuses essentially on English cases, he is so confident in his theory that he feels able to declare that "the book would look much the same if I had primarily used the case law of any other common law jurisdiction."¹⁷ Fundamentalism and arrogance are common bedfellows.

The second manifestation of blindness brought on by fundamentalism is the frequency with which too many theorists resort to re-writing or re-engineering the case law. This re-engineering often has implications which the theorists then overlook and which are actually the very opposite of what was intended. Stevens, it will be seen, sees individual rights as the foundation of tort law rather than its product. Yet not only does this put the cart before the horse, his analysis actually turns out

¹⁷ STEVENS, *supra* note 14, at vii.

to have the perverse effect of downgrading individual rights to bargaining chips which can be “trumped” by greater claims, including government policy. So a theory which promises greater individual autonomy and less government intervention proves instead to have quite the contrary implications.

Part III attempts to see whether Stevens’s analysis can be rescued at any level. Using a methodology originally developed by the German political philosopher and sociologist, Max Weber, it argues that the best way to understand Stevens’s analysis is actually as a purely theoretical construct or “ideal-type” which facilitates both comparison with other explanations and the identification of trends in tort law.¹⁸ Taken this way, however, it becomes clear that the law of torts is actually moving *away* from anything resembling Stevens’s model. An alternative model is clearly required.

But, in case the blindness identified in Parts II and III is taken to apply only to the fundamentalism of rights theory (or of corrective justice theory more generally), Part IV offers an equivalent critique of the fundamentalism of economic analysis. Whereas rights are the ostensible object of Stevens’s idolatry, what may be called “economism” worships at the altar of economic efficiency. Yet it is afflicted with the same extreme myopia. So economism’s unitary view of tort law fails entirely to address differences between jurisdictions, such as those which still recognize joint and several liability as compared to those where that doctrine has (apart from vicarious liability) been abolished. While gods may work in mysterious ways, it is difficult to see why joint and several liability is efficient in one jurisdiction but not in another (or *vice versa*). Of course, this conundrum could be blamed on the meddling of politicians, if only so much of the legislation introduced to abolish joint and several liability had not been supported by the law-and-economics brigade. (If the common law of torts really does produce optimally efficient outcomes, it is not clear why it should need legislative assistance.) In any event, different rules in different jurisdictions are more commonly a product of the courts themselves. The circum-

¹⁸ MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch trans., 1942).

tances in which a plaintiff may successfully recover damages for emotional distress is but one example of rules differing significantly from state to state, and from nation to nation, yet these differences are entirely a product of the courts themselves. It is hard to believe that what is efficient changes at exactly the geographical boundary that legal jurisdictions change. In other words, economic fundamentalism simply fails to acknowledge that the law has a certain degree of autonomy from external influences.

Absolutely central procedural issues such as whether the questions posed by a particular tort doctrine are required to be decided by a judge or a jury are also entirely overlooked by fundamentalist economic theorists, so that an account of tort law is provided which makes it sound as though juries play a very minor role in the adjudication of tort law disputes. Yet we all know that this is very far from the truth. Moreover, this blind re-engineering of legal doctrine and procedure actually depends on a confusion of micro and macroeconomics. Just as Stevens's rights theory involves a parody of individual rights, economism suffers from the problem that it depends on a hopelessly muddled view of economics. Ironically, this re-engineering has the perverse effect of promoting a view which is the very opposite of Adam Smith's "invisible hand." As a result, the theory has more in common with the views of early Soviet legal theorists than with what could reasonably be expected of advocates of a free market.

Part V makes broader observations as to why the whole fundamentalist endeavor—whether based on rights or economics—is doomed to failure. It notes, in particular, that fundamentalism is effectively a form of reductivism. The law is reduced either to a matter of economics or to a matter of metaphysics. What fundamentalists fail to understand is that, on the contrary, the law is actually a body of relatively autonomous practices. These are not always driven by external forces so much as by the purely internal requirement that they are reasonably coherent and consistent. While the law of torts clearly has some relationship to matters of economics and ideas of rights, it is not reducible to either of these elements. Ironically, lay persons have little difficulty in distinguishing the law on the one hand

from either rights or economics on the other. They may, for example, find that the law says that they have rights, but that these must yield in a particular case to the rights of others; or they may simply find that the cost of vindicating their rights through the law is simply too high to be worthwhile. In either case, these lay persons will be able to clearly distinguish what the law says from what their rights are, or from whether it is economically efficient for them to have the law confirm their legal position. The reason that the law is so clearly distinguishable from both rights and economics is, of course, that it takes on its own form. It will be argued that trends in the law of torts are often attributable to the ways in which that form mediates these external influences.

There is, however, no point in throwing out the baby with the bath water. There can be no doubt that tort law has been, and continues to be, shaped and influenced by ideas of rights and justice on the one hand, and by economic considerations on the other. Nothing in this paper should be taken as questioning that truism. What is rejected is the view that, at its root, the law of torts is fundamentally about one set of preoccupations rather than the other. Tort law, like the society which it seeks in some way to regulate, is much more complex than that. Simplistic, fundamentalist theories fail to capture what attorneys and courts do or what the general public would recognize. On the other hand, trying to combine these opposing schools of thought is likely to degenerate into some internally incoherent compromise theory. While proposing a movement away from the reductivist approach of fundamentalism, this section also advocates steering away from a bi-dimensional approach which still fails to allow for any degree of legal autonomy. It proposes instead a broader, three-dimensional framework. The previously discussed external influences comprise the first dimension. The second is the law's own form. The third is the dimension of time. Only by seeing the law of torts as a series of trends is it possible to incorporate the insights of both the law-and-economics and rights or corrective justice schools so as to provide a meaningful theory of tort law without at the same time resorting to some hopelessly unworkable compromise within and between the other two dimensions.

II. A CASE STUDY IN FUNDAMENTALISM

A. *Two Conceptions: Neither Immaculate*

Stevens opens his book with the following revelation: "Two incompatible conceptions of the law of torts are discernible within the common law."¹⁹ He continues:

The first, and probably dominant, conception is that the defendant should be liable where he is at fault for causing the claimant loss unless there is a good reason why not. . . . There is another conception of the law of torts. . . . A wrong is a breach of a duty owed to someone else. A breach of a duty owed to someone else is an infringement of a right they have against the tortfeasor. . . . The law of torts is concerned with the secondary obligations generated by the infringement of primary rights.²⁰

There are a number of problems with this formulation. It is telling indeed that Stevens does not identify which theorists believe in which "conception." More fundamental is the fact that, in claiming that all reputable theorists hold to one or the other of these two conceptions, Stevens has failed to provide proper correspondence between them. Thus his depiction of the "loss conception" gives it three elements: (1) wrongdoing, (2) loss, and (3) the absence of an affirmative defense. But his "rights conception" only has one: wrongdoing. While the omission of loss (or of any synonym for, or analogy with, loss) is entirely explicable given the very nature of the distinction between the two models, Stevens's failure to include "absence of an affirmative defense" (or of anything resembling it) as an element required by the rights conception means that his characterization is both inaccurate and misleading. It suggests that, while those who believe that tort law is about liability for the causation of loss also believe that such loss can sometimes be excused or justified, those who adopt the "rights conception" make no such concessions. In other words, the latter group apparently believes that rights are inviolable.

¹⁹ STEVENS, *supra* note 14, at 1.

²⁰ *Id.* at 1-2.

Yet, as will become clear later, this could hardly be further from the truth. Indeed, it transpires that Stevens actually believes that rights can be overridden in a wide variety of circumstances, including through the exercise of privilege by government representatives. It is hard to imagine other rights and corrective justice theorists, like Ronald Dworkin or Ernest Weinrib, taking this view. It is thus not at all clear whether any other theorists would wish to join Stevens in his own "rights conception." So his assertion of a dichotomy between the "rights" and "loss" conceptions may well put only Stevens in the former camp, while the latter must encompass a very broad church indeed. Self-confidence is a wonderful thing, but such asymmetry must cast doubt on whether Stevens has really identified an important fault-line in tort law theory after all.

Moreover, this disinformation about affirmative defenses is not the only instance of a lack of appropriate correspondence in Stevens's comparisons between his two theoretical constructs. This raises suspicions that he is simply using the idea of a "loss conception" to construct a theoretical straw man. When discussing the comparative requirements regarding the elements of wrongdoing and harm, he claims that:

On [the] rights-based model there are two questions: 'has the defendant infringed a right of the claimant?' and 'what loss to the claimant (or gain to the defendant) is consequent upon the infringement of the right?' The one question required by the loss-based model is 'has the defendant caused the claimant loss (or himself gain) by his reprehensible actions?' This appears deceptively more straightforward, but in many cases proves almost impossible to answer ²¹

Yet a moment's reflection shows Stevens's distinction to be hopeless. If the "loss-based model" is not to be a mere caricature, there are actually two questions at work there too. It is just that his phrase "reprehensible actions" simply presupposes that the first question has already been asked and answered. Unpacking this phrase reveals that the two questions to be addressed are: (1) has the defendant behaved in a reprehensible

²¹ *Id.* at 133.

manner? And, if so: (2) what loss to the claimant (or gain to the defendant) is consequent upon that behavior?

Stevens maintains that the one question involved in the "loss conception" "in many cases proves almost impossible to answer" so that it is hopelessly imprecise and open to abuse.²² But now that it can be seen that the "loss conception" really involves the *two* questions, (a) and (b) above, it is difficult to see why it is any less practicable than Stevens's preferred "rights conception." Stevens may not like the economists' answer to question (a), which would see it turn on some Posnerian interpretation²³ of the Learned Hand formula from *United States v. Carroll Towing Co.*,²⁴ but it is hard to see why cost-benefit analysis should be any more problematic in practice than identifying the existence and ambit of specific rights. Stevens himself is completely unable to provide a meaningful guide as to what the relevant rights may be, and he is scarcely more able to explain how they should be applied. His list of "rights" to be covered in a textbook written to his own specification is a veritable hodge-podge, and yet still includes a heading called "Rights—Other" in case he might have omitted some.²⁵ So if the "loss conception" is deceptively impracticable, then his preferred "rights conception" suffers from precisely the same problem.

In fact, however, Stevens's "loss conception" is a caricature. Even though his original articulation of the loss-based approach has now been unpacked to reveal two distinct questions, it is still not an accurate depiction of any reputable theorist's approach to tort law. A vital third ingredient—that of obligation or a duty of care—is still missing. It is as if Stevens is attempting to accuse all those who disagree with him of employing Judge Andrew's analysis in *Palsgraf v. Long Island Railroad Co.*²⁶ to the whole of tort law. Yet Judge Andrews himself went nowhere near that far. He actually said: "Every one owes to the world at

²² *Id.*

²³ See generally, Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972).

²⁴ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d. Cir. 1947) ("if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B is less than PL").

²⁵ STEVENS, *supra* note 14, at 303.

²⁶ *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928).

large the duty of refraining from those acts that may unreasonably threaten the safety of others.”²⁷ “Safety” is a concept clearly confined to protection from physical harm. There is nothing here to support the idea that anyone who causes harm, *no matter what its form*, to someone else is potentially liable to pay compensation for so doing. Whether the harm caused is to another person’s mental equilibrium, enjoyment of land or reputation, etc., no apparent advocates of the “loss conception”—including advocates of economic analysis²⁸—dispute that the defendant must have owed the plaintiff a legal duty in order to be found liable. Indeed, the difference in the approaches between Section 7 and Section 37 of the latest Restatement of Torts rests precisely on this distinction between types of harm. Section 7 deals with physical harm and presumes that a duty is owed (as Judge Andrews argued in *Palsgraf*); Section 37 deals with other types of harm and presumes that no duty is owed. But these presumptions are rebuttable so that, even in circumstances where Section 7 applies, a court may find that the presumption is rebutted and that no duty in fact existed, despite the fact that the case before it is one where physical harm is alleged. New York plaintiffs, of course, must always prove that they were owed a duty of care because Chief Judge Cardozo’s majority opinion in *Palsgraf* is still good law there; and such proof is also always required in Robert Stevens’s own jurisdiction in England and Wales.²⁹ Moreover, the requirement that some form of duty has to be owed by the defendant to the plaintiff in order for the former potentially to become liable to the latter becomes even clearer when other torts are implicated such as premises liability, trespass, nuisance or a dignitary tort. So (even without considering any affirmative defenses) any meaningful version of the “loss conception” must actually ask three questions: (1) did the defendant owe the plaintiff a duty? If so, (2) has the defendant behaved in a reprehensible manner? and, if so, (3) what loss to

²⁷ *Id.* at 103 (Andrews, J., dissenting).

²⁸ *See, e.g.,* Hylton, *supra* note 5, at 1501.

²⁹ *Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd., (The Nicholas H.)* [1996] A.C. 211, 235 (H.L.) (citing with approval *Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd. The Nicholas H.* [1994] 1 W.L.R. 1071, 1077 (C.A.)).

the claimant (or gain to the defendant) is consequent upon that behavior?

It now becomes clear that, far from being mutually exclusive, the "loss conception" and Stevens's preferred "rights conception" overlap to a very large extent. One focuses on the rights of the plaintiff, the other on the duties of the defendant. Many scholars would argue that these are, in fact, just different ways of asking the same question. Since rights correlate with duties, focusing on one rather than the other simply changes the perspective, not the central issue.³⁰ Indeed, it is submitted that, if anything represents the dominant view in the United States today, it is a hybrid of Stevens's two conceptions, which effectively joins both perspectives together.³¹ In other words, a defendant is typically said to be liable in the law of torts if—and only if—he *both* violates someone else's rights *or* breaches a legal duty *and* thereby causes that person harm. Thus the causation of harm is not by itself the basis for a successful claim, but neither is a violation of a right where no harm has been done.

The same point can be made even more clearly if we reconsider what is now question (2). What exactly does "reprehensible" mean here? One possibility has already been suggested: it could mean the failure to take steps which a cost-benefit analysis would have shown to be prudent.³² But since the number of scholars who might be identified with the (increasingly artificial) "loss conception" is so large and varied, there is every reason to believe that this question could be answered in many different ways. It could, for example, be viewed as the breach of certain social norms or responsibilities.³³ Or it could be seen simply as the cost to be borne for engaging either in risky activity *per se*,³⁴ or in unexcused, non-reciprocal risk-taking.³⁵ But

³⁰ See, e.g., Ernest J. Weinrib, *The Disintegration of Duty*, in *EXPLORING TORT LAW*, *supra* note 3 at 143, 154-55.

³¹ See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 38-40 (2001).

³² See, e.g., Posner, *supra* note 23, at 32.

³³ See, e.g., JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 38-40 (2004).

³⁴ See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 89 (1970).

equally, there is absolutely no reason why it could not be considered as the violation of another person's rights. Richard W. Wright has declared, for example, that:

The question, then, is what type of losses should be compensated. . . . To answer this question, we must know the normative ground of compensation. . . . I believe . . . that the equal freedom theory . . . underlying the concepts of Right and justice . . . and its constituent concept of corrective justice undergird the general structure, content and institutions of tort law.³⁶

So Stevens's assertion of a fundamental incompatibility between the "loss conception" and the "rights conception" turns out, on closer inspection, to be mythical. Attempts to furnish a theory to explain current tort law which assert meaningless distinctions are likely not so much to assist that endeavor as to bring it into disrepute.

B. Substituting for rights

Clinging to the wreckage of the "rights conception" leads to a second misunderstanding. Stevens maintains that a claim for damages amounts to the assertion of a secondary right as a substitute for the primary right (e.g., of bodily safety, property, reputation, etc.) that has allegedly been infringed.³⁷ In one sense, his argument is trite. It is obvious that the receipt of damages comes a poor second to not being injured in the first place. It is also obvious that awards of damages are designed to compensate for the fact that a tort has been visited upon the plaintiff. Stevens, however, wants to go further and argue that a person's rights are the cornerstone of the law of torts, so that awards of damages are designed to compensate not for any harm sustained but for the loss of those rights. This is the real nub of the distinction between his "rights conception" and the supposed "loss conception," since the latter sees payments of

³⁵ See, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 544-45 (1972).

³⁶ Wright, *supra* note 11, at 159-60.

³⁷ STEVENS, *supra* note 14, at 59-62.

damages as being designed to compensate victims for the amount of harm suffered.

Once again Stevens has taken a step too far. Even if the most appropriate way to characterize the law of torts is to say that it involves a breach of someone else's rights, it does not follow that the measure of damages to be paid for such a violation must be equal to the value of the right itself. Indeed, it turns out that Stevens does effectively concede the point for a large number of torts cases. He says, for example, that "in principle . . . [the law] requires proof that the claimant was factually worse off as a result of the infringement of the right."³⁸ This begs the question of why the two conceptions exist. One answer is that Stevens believes that the notion of loss fails to account for damages paid to plaintiffs when they have not apparently suffered any loss, such as the rights to damages in defamation or in trespass to land when no consequential harm is proven:

In the assessment of damages it is necessary to distinguish between damages awarded as a substitute for the right infringed and consequential damages as compensation for loss to the claimant, or gain to the defendant, consequent upon this infringement.³⁹

Whereas consequential (essentially economic) damages, such as loss of income and cost of health care, are assessed according to circumstances specific to the particular victim, what Stevens calls "substitutive damages" are (he says) assessed objectively according to the nature of the right for which they are a substitute, "save where the infringement is particularly egregious."⁴⁰

However, this argument suffers from a fatal flaw concerning the very notion of substitutive damages. In the vast majority of cases, the concept can have no relevance. After all, unless killed or paralyzed,⁴¹ the victim does not usually lose any rights;

³⁸ *Id.* at 59.

³⁹ *Id.* at 60.

⁴⁰ *Id.* at 60.

⁴¹ In *Chester v. Afshar*, the House of Lords in England held that the paralyzed victim of medical malpractice lost forever the right to defer treatment or to choose a differ-

and, paradoxically, where rights truly are lost, their value is assessed precisely by considering the degree of *harm done to the plaintiff*. Indeed, the plaintiff may not even be the same as the person whose rights were originally infringed. A wrongful death action, for example, involves a claim by the financial dependants of the decedent for the injury *they* have suffered, not for the value of the loss of rights of the decedent.⁴² In any event, as already noted, the vast majority of claims do not involve the loss of a right but its alleged *infringement*. Someone injured in a car wreck still retains any right to bodily integrity (or personal dignity or autonomy) which she had before the accident. The issue which is the subject of her claim against the tortfeasor is not that her rights have been lost, but that they have been violated. Any award of damages therefore reflects the degree of violation: in other words, the amount of harm done. It is the same with an act of trespass or defamation. In either case the victim does not lose her right to quiet enjoyment of her property or to her reputation. There is no question of seeking “substitutive” damages because no right has been lost for which they can substitute; the plaintiff simply seeks compensation for degree of intrusion or harm suffered.

In any event, it is difficult to know what the concept of “substitutive damages” could actually mean in practice. Once we accept the idea of legal rights, we must also accept that they are enjoyed by every citizen. Since every citizen is equal before the law, every citizen’s rights must have the same value. Thus (after allowing for inflation) recompense for the violation of one person’s rights must be worth the same as any other’s for violation of the same rights within the same jurisdiction. Yet it takes only a cursory glance at awards of damages to realize that this does not reflect reality. Indeed, it entirely misrepresents not just the substance of awards made but also the process by which those awards are assessed. If damages were, in a significant number of cases, really about compensating the plaintiff for vi-

ent doctor. [2004] UKHL 41, [2005] 1 A.C. 134 (H.L.), *available at* <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041014/cheste-1.htm>.

⁴² For the United States, see RESTATEMENT (SECOND) OF TORTS § 925 (1965); for the United Kingdom, see Fatal Accidents Act, 1976, c. 30, §§ 1(3), 3(1).

olation of a legally-protected right *per se* rather than about the amount of harm caused thereby, then surely this would be a matter of law to be addressed by the judge rather than a matter of fact for a jury. That would, after all, be the only way of ensuring that each violation led to the same award regardless not only of the identity or status of either party but also of any other circumstances. Yet in the United States, the assessment of damages is still left to the jury.

Even in England, where juries rarely sit in tort cases, the “tariff” of compensation on which the final award by the trial judge is based revolves around the amount of harm done, not the nature of the right violated.⁴³ Whether the injury suffered is done to the head, hair, skin, joints, limbs or internal organs, the right identified by Stevens which is infringed in each case is the same: the right to bodily safety.⁴⁴ Yet the *Guidelines for the Assessment of General Damages in Personal Injury Cases* do not even stop at distinguishing between these types of injury. They go further and differentiate between, for example, hand and wrist injuries, or between a minor head injury and epilepsy.⁴⁵ It should be emphasized that the *Guidelines* do not deal with consequential losses, such as loss of income, which even Stevens agrees are assessed according to the magnitude of harm sustained by the individual victim. The *Guidelines* refer only to what in England and Wales are called “general damages,” namely, damages to be awarded to mark the fact that a tort involving bodily injury has been committed; they are awarded *in addition to* any damages for consequential loss. If anything were to represent Stevens’s “substitutive damages,” it would be the *Guidelines*. And yet they do nothing of the sort. No matter how elegant, any theory of torts which cannot account for the process and calculation of awards of damages inevitably leaves something to be desired.

⁴³ See Lord Donaldson of Lynton, *Forward to the First Edition of JUDICIAL STUDIES BOARD, GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES*, at ix (8th ed. 2006).

⁴⁴ STEVENS, *supra* note 14, at 5.

⁴⁵ JUDICIAL STUDIES BOARD, *supra* note 43, at 9, 36.

C. Rights Gone Wrong

The arguments discussed so far have all been advanced by Stevens as “conceptual” and “functional” claims.⁴⁶ In other words, he has proffered them as explanations of what tort law means and the purposes it serves. They have, however, been found wanting in both respects. But there is a third string to his bow, by which the “rights model” purports to explain the history of the law of torts. Taking as his starting-point the judgment of Judge Cave in the nineteenth-century English case of *Allen v. Flood*,⁴⁷ Stevens argues that, as a matter of historical fact, the law of torts has identified certain rights which are to be protected. These are rights of reputation, of bodily safety and freedom, and of property;⁴⁸ public rights (such as the right to use the highway),⁴⁹ rights created by an undertaking outside the law of contract,⁵⁰ family rights,⁵¹ “correlative” rights (such as the rights of visitors, which correlate with landowners’ rights to exclusive possession of their property⁵²) and statutory rights.⁵³

Yet even this list is highly problematic. The common law of torts is not a fixed body of rules which one day set out the rights it would protect and then refused thereafter ever to countenance any others unless they were imposed upon it by legislation. Nor are these (or any other) rights protected by one overarching tort. Anyone making this sort of argument must therefore be careful to explain and justify the quirks and niceties of each specific tort. Stevens is effectively lumping together, among others, the torts of defamation, negligence, trespass (both to person and to property), nuisance (both public and private) and premises liability.⁵⁴ So he needs to explain, for example, why—according to English law—there is a defense of qualified privilege in defama-

⁴⁶ See Goldberg, *supra* note 9, at 515.

⁴⁷ *Allen v. Flood*, [1898] 1 A.C. 1, 29.

⁴⁸ STEVENS, *supra* note 14, at 5.

⁴⁹ *Id.* at 8.

⁵⁰ Which could alternatively be called assumption of responsibility. See *id.* at 9-14.

⁵¹ *Id.* at 15.

⁵² *Id.* at 15-16.

⁵³ *Id.* at 16-17.

⁵⁴ Premises liability is known as occupiers’ liability in England. See Occupiers’ Liability Act, 1957, c. 31, § 1, sched. 2; Occupiers’ Liability Act, 1984, c. 3, § 1, sched. 2.

tion but not in negligence when both torts can be applied to the same set of facts.⁵⁵ Yet he does not do so.

This defense effectively permits a defendant to injure another person's reputation by means of a written communication in circumstances where both writer and recipient have an interest in that communication, such as in the provision of a reference, so long as the tort alleged by the plaintiff is defamation.⁵⁶ No such defense has ever been permitted, however, by the tort of negligence. Historically, the right to reputation was protected by the tort of defamation. But this does not explain how and why the same facts may nowadays support an allegation of negligence too, so that a plaintiff in England can effectively avoid having the defendant plead the defense of qualified privilege by suing in negligence instead.⁵⁷ Yet this inadequacy in Stevens's approach is minor in comparison to the problem posed for him by American tort law, which has moved in precisely the opposite direction. The American approach means that the right to reputation—formerly given the protection which it now enjoys in England⁵⁸—is now essentially overridden by the First Amendment right to freedom of speech.⁵⁹ Yet Stevens says expressly that “we do not have a ‘right’ . . . to freedom of expression.”⁶⁰ His approach is simply ahistorical.

While a theory of torts based essentially on rights might be able in principle to explain a snapshot of legal history, it will inevitably struggle to show how the common law has changed and developed over time, especially when the tort historically connected with protecting a given right is effectively being usurped either by an alternative tort or by a new application of constitutional law. The emergence of the tort of negligence on

⁵⁵ *Spring v. Guardian Assurance Plc.*, [1994] UKHL 7, [1995] 2 A.C. 296 (H.L.), available at <http://www.bailii.org/uk/cases/UKHL/1994/7.html>. American law used to arrive at a similar result by saying that the defense of qualified privilege in defamation could be defeated by proof of negligence. See RESTATEMENT OF TORTS § 601 (1938). Now, however, constitutional ideas of free speech have been held to trump any allegations of wrongdoing where the latter has not been the product of deliberate malice. See RESTATEMENT (SECOND) OF TORTS § 600 (1977).

⁵⁶ *Watt v. Longsdon*, [1930] K.B. 130, 142 (C.A.), per Scrutton, L.J.

⁵⁷ *Spring*, [1995] 2 A.C. 296.

⁵⁸ RESTATEMENT OF TORTS § 601 (1938).

⁵⁹ RESTATEMENT (SECOND) OF TORTS § 600 (1977).

⁶⁰ STEVENS, *supra* note 14, at 5.

both sides of the Atlantic has, for example, steadily undermined the claims of the dignitary torts of assault and battery to be the protectors of the right to bodily safety. Stevens's "rights conception" cannot explain this trend since the right remains constant while the legal means of protecting it has changed considerably. Similarly, the rule in *Rylands v. Fletcher*⁶¹—which created a tort which is often championed as a significant defender of property rights—has suffered a slow and agonizing death in England at the hands of the torts of nuisance and negligence;⁶² yet Stevens's theory is again unable to explain it.

Moreover, even if we ignore the law of negligence in the context of the right to reputation and consider only the law of defamation, the ramifications of Stevens's own explanation for the existence of the defense of qualified privilege are of even greater concern. The problem that he must address is that, if someone is effectively entitled to ruin another person's reputation in the very circumstances where it is most likely to do serious harm—in the giving of a reference—then can this apparent "right" of reputation really be characterized as a "right" at all? Stevens's answer is to say that it is indeed a right, but that it is overridden by the privilege of the person making the statement.⁶³ An important feature of a privilege—as opposed to a right—is that it "is a liberty persons generally do not have"⁶⁴—and, says Stevens, it is not confined to the law of defamation. He gives other examples taken from the laws of nuisance, negligence and ultra-hazardous activity.⁶⁵

This explanation opens the most objectionable can of worms because it tells us nothing about the way in which these privileges are created or obtained. Rights are enjoyed by all citizens, simply by virtue of their existence. But privileges are not. We therefore need to know who has these privileges; and how, when and why they are acquired. Unfortunately, Stevens completely fails to address any of these issues. The closest he comes is in

⁶¹ [1868] UKHL 1, available at <http://www.bailii.org/uk/cases/UKHL/1868/1.html>.

⁶² *Cambridge Water Co. v. E. Counties Leather Plc.*, [1994] 2 A.C. 264, 264.

⁶³ STEVENS, *supra* note 14, at 105-106.

⁶⁴ *Id.* at 103.

⁶⁵ *Id.* at 103-107.

offering a brief account of the limits of certain privileges.⁶⁶ But asserting that there are limits to them tells us nothing about how, where, when and to whom they accrue in the first place. Most alarmingly, Stevens believes that such privileges can accrue to those working for government.⁶⁷ His theory now begins to unravel. His "rights model" is ostensibly intended to assert that the essence of the law of torts is its protection of a series of individual rights. These rights are supposed to act as claims on—and defenses against—other individuals and institutions, including government. Yet it now turns out that this model actually facilitates the common law's tolerance of government attempts to attenuate or undermine those very rights. It might be appropriate to say that government is free to limit rights, other than Constitutional rights, by means of legislation. But to allow individual rights to be cut down through the common law in this indeterminate manner is the very antithesis of any recognizable rights-based approach. Whereas Ronald Dworkin, for example, believes that rights "trump" policy,⁶⁸ Stevens's own "rights model" enables privilege to trump rights.

As already noted, Stevens leaves open to conjecture an explanation of the type of circumstances which may create a privilege to attenuate or undermine rights. Implicit in his account, nevertheless, seems to be some notion that such privilege may arise in situations of emergency. He explains *Vincent v. Lake Erie Transportation Co.*⁶⁹ in this way. There the crew of the defendant's ship lashed the vessel to the plaintiff's dock without permission in order to keep it safe during a storm.⁷⁰ The court held that they had acted lawfully in so doing, but that the defendant was required to compensate the plaintiff for the damage done to the dock as a consequence.⁷¹ Stevens's explanation is that the owner of the dock had a right to peaceful and exclusive enjoyment of his property, but that the emergency gave the crew

⁶⁶ *Id.* at 103-107.

⁶⁷ *Id.* at 105.

⁶⁸ Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984).

⁶⁹ 124 N.W. 221, 221 (Minn. 1910).

⁷⁰ *Id.*

⁷¹ *Id.* at 222.

a privilege to override that right. However, that privilege did not extend to absolving the owners of the vessel from responsibility for the “damage suffered as a result of its exercise.”⁷² But not only is this explanation for the case at variance with that given by the court in *Vincent* itself, it is strangely perverse for someone who has been denigrating a supposed “loss conception” of the law of torts in favor of a “rights conception.” It effectively suggests that the law is keener to protect plaintiffs from loss than it is to protect their rights. In other words, Stevens’s explanation looks more like an argument in favor of the “loss conception.”

In any event, this account hardly explains the doctrine of qualified privilege in defamation, where there is no question of emergency, let alone how some cricketers in England acquired (according to Stevens) a privilege to hit cricket balls into a neighbor’s garden (albeit that, as in *Vincent*, they had to pay for any damage they caused).⁷³ Stevens says that the case which he cites on this last issue, *Miller v. Jackson*,⁷⁴ is a “difficult case on the margin,”⁷⁵ but are we really to suppose that those pursuing a leisure activity may accrue a privilege to trespass over another person’s land? If so, and if “the book would look much the same if [he] had primarily used the case law of any other common law jurisdiction,”⁷⁶ then it must presumably be the case that throughout the United States, those playing baseball acquire a privilege to trespass on their neighbors’ property. Unfortunately for Stevens, American case law simply does not fit his theory.⁷⁷ In fact, he is scarcely on firmer ground when confined

⁷² STEVENS, *supra* note 14, at 104.

⁷³ *Miller v. Jackson*, [1977] EWCA (Civ) 6, discussed in STEVENS, *supra* note 14, at 105.

⁷⁴ [1977] EWCA (Civ) 6, available at <http://www.bailii.org/ew/cases/EWCA/Civ/1977/6.html>.

⁷⁵ STEVENS, *supra* note 14, at 105

⁷⁶ *Id.* at vii.

⁷⁷ See, e.g., *Hennessy v. Boston*, 164 N.E. 470, 471 (1929) (holding that hitting baseballs onto Plaintiff’s property as well as entry onto property to retrieve balls constituted trespass and nuisance). The law takes much the same view about the incursion of golf balls. See, e.g., *Fenton v. Quaboag Country Club, Inc.*, 233 N.E.2d 216, 219 (Mass. 1968) (holding that residential property owners living adjacent to golf course were entitled to injunction to prevent operation of one hole of the golf course and to abatement of trespass by flying golf balls falling on Plaintiff’s premises); *Amaral v. Cuppels*, 831 N.E.2d

to the shores of the United Kingdom. Perhaps the best potential justification for the notion that the cricketers acquired a privilege in *Miller* is that they had played at the same venue for seventy years.⁷⁸ However, an activity of considerably greater longevity within the UK is that of riding to hounds. Yet English law does not entitle participants to ride over land owned by someone who has not given permission.⁷⁹ The attempt to explain *Miller* on the basis of some mystical acquisition of privilege just does not work.

This leads us on to what is probably the most fundamental problem with Stevens's "rights model." Surely the whole point of the rhetoric of rights is that it implicitly demands the assistance of the law in protecting those rights. Philosophies of rights take their power from the idea that a right is an individual claim on the instruments and institutions of government—whether executive or judicial—to protect and enforce something deemed fundamental to our way of life. When raised to the level of Constitutional rights, they can even be bulwarks against legislative incursion. If these so-called "rights" can, however, be undermined from time to time by someone else's "privileges"—especially when those privileges can be conferred on government employees—then it follows that the legal system does not, after all, consider rights to be fundamental. According to Stevens's analysis, individual rights are effectively reduced to bargaining chips; if someone with a stronger claim comes along, they will necessarily be sacrificed.

A simple example should suffice to demonstrate just how far from any recognizable "rights model" this takes us. According to both domestic and international law, torture is apparently prohibited,⁸⁰ which Stevens can support by relying on his

915, 918 (Mass. App. Ct. 2005) (holding that recurring entry of golf balls onto Plaintiff's property constituted continuing trespass).

⁷⁸ *Miller*, [1977] EWCA (Civ) 6 (Lord Denning MR).

⁷⁹ See, e.g., DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, THE FINAL REPORT OF THE COMMITTEE OF INQUIRY INTO HUNTING WITH DOGS IN ENGLAND AND WALES, 2000, Cm. 4763, at 146-56, available at <http://www.huntinginquiry.gov.uk/mainsections/report.pdf>.

⁸⁰ See, e.g., Universal Declaration of Human Rights, G.A. Res., 217A, at 73 U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); Council of Europe, European Convention on Human Rights and Fundamental Freedoms, art. 3, Nov. 4,

claim that there is a right to bodily safety. But what if a government were to torture suspected terrorists because it claimed that it could thereby extract information vital to the immediate protection of its citizens? This could certainly be said to be an example of an emergency. Stevens's analysis clearly enables courts to read into both the legislation and international instruments a privilege for would-be torturers in such circumstances. At this point his "rights model" suddenly disintegrates into pitiless irony: it becomes a model that actually legitimizes wrongdoing. Dworkin's "rights thesis," for example, would emphatically reject the legitimization of torture as entirely contrary to the principle of equal concern and respect.⁸¹ But Stevens's list of rights enforced by the common law has no underlying theme to it. He offers no overall benchmark of what it is that turns certain interests into rights worthy of legal protection. He is thus left either to countenance torture or else to stand idly by, keeping his fingers crossed that no court would actually be persuaded that the practice of torture can in some circumstances be considered a privilege. Either way, his rights model turns out not to protect individual rights at all, but to legitimize their destruction.

D. Orthodoxy and Nuance

A more orthodox analysis of qualified privilege goes along the following lines. In the case of a potentially defamatory reference, the person whose reputation is at stake has an interest in that reputation. This interest may at times be in competition with the interest in free speech of the person sending the reference and/or with the reliance interest of the recipient who needs to know that the statement is made honestly and without fear

1950, 213 U.N.T.S. 221 [hereinafter ECHR]; International Covenant on Civil and Political Rights, art. 7, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113; U.S. CONST. amends. V, VIII, XIV; 18 U.S.C. § 242 (making it a criminal offense for any public official willfully to deprive a person of any right protected by the Constitution or laws of the United States).

⁸¹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82, 364 (1977); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 198 (1985).

or favor. The law is then required to engage in some sort of balancing exercise which considers the relative weights of these interests before deciding which should prevail. That balancing exercise has yielded different results in different jurisdictions within different eras. Nowadays, American law has chosen to prefer the interests of the referee over those of the person whose reputation is at stake, unless the latter can show that the former acted with malice.⁸² But the fact that the balancing exercise has led to different answers at different times and in different jurisdictions demonstrates that, contrary to Stevens's assertion, it is not—and never has been the case—that the person making the statement is exercising a privilege, but that the *occasion* of the statement is privileged.⁸³ In this sense, use of the word “privilege” indicates not some special “über-right” gained through mythical means by a lucky individual. It instead signifies a factual matrix in which individual rights will normally be in conflict, but where the law has already settled their hierarchy. In cases of qualified privilege, such as the provision of a job reference, this hierarchy takes the form of a rebuttable presumption: the right to free speech beats the right of reputation unless the former is maliciously abused. However, in cases of absolute privilege—interestingly, omitted completely from Stevens's analysis—the law has taken a conclusive view which cannot be rebutted. Thus statements in court and in legislatures on both sides of the Atlantic are immune from a claim for defamation because the right of free speech has always been deemed to be more important in those forums than the right to reputation (especially since judges and legislators can be expected to police their own respective domains with due vigor).

Stevens cannot take this position because he believes that “we do not have a ‘right’ at common law to freedom of expression.”⁸⁴ Now this statement is probably accurate if taken literally, because the right to freedom of expression is usually taken as

⁸² See, e.g., *Toker v. Pollak*, 376 N.E.2d 163, 166 (N.Y. 1978) (holding that qualified privilege negates the presumption of implied malice and placing the burden of proof on that issue on the Plaintiff).

⁸³ *Adam v. Ward*, [1917] A.C. 309, 334 (H.L.).

⁸⁴ STEVENS, *supra* note 14, at 5.

emanating from sources like the US Constitution⁸⁵ or international treaties⁸⁶ rather than from the common law. But so what? Later in the same chapter Stevens includes among the rights protected by the law of torts some rights created by statute.⁸⁷ Within the United Kingdom there is thus no reason for excluding the right to freedom of expression since, although originally expressed in the European Convention on Human Rights,⁸⁸ this right has since been incorporated into domestic British law by legislation.⁸⁹ And if legislative rights count as meaningful rights in tort law, it is difficult to understand why Constitutional rights such as the First Amendment of the US Constitution should not be at least as significant. Indeed, Stevens himself criticizes an Australian judge who attempted to explain the otherwise inexplicable outcome of a case by resorting to such pedantry.⁹⁰ As he rightly says, "a wrong is a wrong, regardless of whether the duty is imposed by the common law or legislation."⁹¹ For the purposes of the current discussion, therefore, whether the right to freedom of expression was originally a creature of the common law is, therefore, simply irrelevant.

More germane to an understanding of Stevens's approach is his view that what appears to be a "right" to freedom of expression is not really so but is in fact a liberty carved out as a *consequence* of other rights. Thus, for example, the right to bodily safety means that no-one can use physical violence to stop me from saying what I choose.⁹² The problem is that this characterization is no more than a half-truth. The right to freedom of expression is not just a liberty but can indeed extend to a claim on the instruments and institutions of government, as well as potentially to a claim on other private individuals. Within the

⁸⁵ U.S. CONST. amend. I.

⁸⁶ ECHR, *supra* note 80, art. 10.

⁸⁷ STEVENS, *supra* note 14, at 16-17.

⁸⁸ Council of Europe, *supra* note 80, art. 10.

⁸⁹ Human Rights Act, 1998, c. 42, § 6 (Eng.).

⁹⁰ Judge Fullager declared in *Darling Island Stevedoring & Lighterage Co. v. Long* that: "It is a misuse of a term with a long-established meaning to call a breach of a statutory duty a 'tort.'" (1957) 97 C.L.R. 36, 56 (Aust.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1957/26.html>.

⁹¹ STEVENS, *supra* note 14, at 264.

⁹² *Id.* at 5.

United Kingdom, for example, every broadcaster has a legal obligation to deal with controversial political and current affairs issues with "due impartiality."⁹³ Inevitably this means that, once one view on such a topic has been aired, the broadcaster is compelled to provide space for a different view (although this does not have to be done mechanistically and some element of editorial judgment is acceptable).⁹⁴ Similarly, in the United States, where a public forum is taken to exist—such as at a city auditorium—the production of a musical cannot be suppressed on the grounds of good taste, which effectively means that a municipal board managing the auditorium must make the venue available for the production.⁹⁵ Clearly, this situation is not a product of other rights, such as the right to bodily safety, reputation or property: it involves a direct claim on a government institution. Resolution of an issue like this is thus the product of nuanced decision-making—including, most importantly, a decision as to what constitutes a public forum—which balances various other rights against the right to freedom of expression. The only way that Stevens's analytical framework could cope with this would be if he were to take a position diametrically opposite to the one that he does. He would have to say not that the right to freedom of expression is simply a liberty created by other rights, but that it is in fact a privilege which trumps those rights. But not only would he then be faced with having to articulate the source and circumstances of such a privilege, he would also have to explain why it is something not enjoyed by all citizens alike.

These theoretical contortions are all avoided by the orthodox explanation. Its relative simplicity has the added benefit of providing what appears to be a more accurate depiction of the

⁹³ Broadcasting Act, 1990, c. 42, § 6, sched. 1.

⁹⁴ Ofcom Broadcasting Code, 2009, § 5.

⁹⁵ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (holding that the burden of proving that material is not protected by the First Amendment is on the person seeking censorship). *See also* *Madison Joint School Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 174-75 (1976) (holding that a school board could not prevent one of its teachers from voicing his concerns at a meeting open to the public). *But cf.* *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (holding that school is not required to permit student speech inconsistent with its educational mission even though government could not sensor similar speech outside of school).

law. But perhaps of even more significance is the fact that it does not place anything above individual rights. Instead, when such rights apparently conflict, it requires courts to engage in thoughtful, nuanced reasoning in order to resolve disputes. Thus, *Vincent v. Lake Erie Transportation Co.*⁹⁶ is not about the creation of some privilege, but about the balancing of the rights to life and property of the defendant and its crew as compared with the right to exclusive enjoyment of land by the plaintiff landowner. Such balancing does not take place in the abstract but in the context of the particular facts of the case, and includes an assessment of the likely and actual harm done. The loss of exclusive enjoyment was thus concluded to be but a small price to pay for preventing the loss of a vessel (or even of human life), while any actual damage done could be met by the payment of appropriate compensation. *Miller v. Jackson*⁹⁷ can be explained in the same way. Since few cricket balls had ever actually been struck into the plaintiff's garden—and the few that had been struck there had caused little damage—there was little reason to constrain the players' liberty with an injunction; any damage could again be met by the payment of appropriate compensation if and when it occurred.

Most importantly of all, the orthodox approach denies a government the ability to permit the torture of individuals, even in the name of national defense or emergency. There can be no question of requiring nuanced decision-making to balance competing interests since no-one has a legitimate interest in torturing others. A case recently heard by the European Court of Human Rights brings home the point.⁹⁸ In *Saadi v. Italy*,⁹⁹ the Court heard an application from a man whom the Italian authorities wished to deport to Tunisia, where a military court had already sentenced him, in his absence, to twenty years' imprisonment for membership of a terrorist organization operating abroad and for incitement to terrorism. He had also been deprived of his civil rights and made subject to administrative su-

⁹⁶ 124 N.W. 221, 222 (Minn. 1910).

⁹⁷ [1977] EWCA (Civ) 6, discussed in STEVENS, *supra* note 14, at 105.

⁹⁸ App. No. 37201/06, Eur. Ct. H.R. (2008), available at <http://www.meltingpot.org/IMG/pdf/saadi.pdf>.

⁹⁹ *Id.*

pervision for a period of five years. Reports from Amnesty International, Human Rights Watch and the U.S. State Department suggested that torture commonly occurred in Tunisian detention facilities.¹⁰⁰ The applicant argued before the Court that deportation would expose him to the risk of being tortured contrary to Article 3 of the European Convention on Human Rights.

The United Kingdom Government submitted an *amicus* brief, which took precisely the line that Stevens's privilege argument suggests. The Court summarized the UK position as follows:

[It] observed that in the *Chahal* case . . . the Court had stated the principle that in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures.¹⁰¹

Effectively, the UK government sought a judicially-created privilege to override the individual right not to be tortured when the application of that right produced an undesirable result for a European government.¹⁰² Quite rightly, the Court refused to adopt this argument. It noted that there was a risk that the applicant might be tortured if deported to Tunisia and held that there was no legal basis on which such risks could be weighed against other factors on a case-by-case basis.¹⁰³ It is hard to understand why any self-proclaimed "rights theorist" would take any other position.

¹⁰⁰ *Id.* paras. 65-79, 82-93.

¹⁰¹ *Id.* para. 117.

¹⁰² *Id.* para. 122.

¹⁰³ *Id.* paras. 143-49.

*E. A Question of Attribution*¹⁰⁴

This discussion of Stevens's treatment of the case law on qualified privilege and the tort of trespass exemplifies a broader problem, unfortunately emblematic of far too much tort theory over the last three decades. The difficulty has been identified by Jane Stapleton thus:

[M]uch torts commentary in North America continues along the well-worn tracks of idealized theories. When those responsible for these intellectual constructs choose to address actual case law, they seek to rationalize it in a process akin to reverse engineering.¹⁰⁵

As can now be seen, Stevens's book suggests that this tendency has now crossed the Atlantic. Perhaps his most sustained piece of "reverse engineering"¹⁰⁶ occurs in his treatment of the doctrine of vicarious liability. Here Stevens is evidently acutely aware that his "rights conception" must somehow withstand the challenge that, in Stapleton's view, always defeats such models because they cannot "accommodate within [them] a compelling explanation of the deeply entrenched uncontroversial phenomena of vicarious liability or the corporate veil."¹⁰⁷ This is because corrective justice and rights models are predicated on the basis that the wrongdoer must pay, whereas vicarious liability has entrenched the notion that a potentially innocent employer—in practice, usually the employer's insurance company—must pay.

Stevens's retort is to argue that vicarious liability is actually a misleading term because it confuses the issue of attribution. The current orthodoxy is that it is the *liability* for one person's tortious act that is attributed to another person. Stevens's view, however, is that it is the *act itself* which is attributed. In other words, he argues against the current orthodoxy of the "servant's theory" of vicarious liability and in favor of a resuscitation of what he claims to be the original "master's theory."¹⁰⁸ In other

¹⁰⁴ *Screen One: A Question of Attribution* (BBC television broadcast Oct. 20, 1991).

¹⁰⁵ Stapleton, *supra* note 3, at 266.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ STEVENS, *supra* note 14, at 260.

words, his interpretation of vicarious liability effectively treats employees working within the course of their employment as agents of their employer. Taking us back to cases from the seventeenth, eighteenth and mid-nineteenth centuries, he asserts that:

The older cases speak of the imputation of acts, not liability. Although it has become more common for the courts to attempt to explain vicarious liability in terms of policy considerations, such concerns were not the historical origin of the rules.¹⁰⁹

James Gordley has warned that we should be very slow to assert what judges in cases over a century ago really meant since it is so difficult to be sure.¹¹⁰ But let us nevertheless assume that Stevens's bold assertions regarding the historical origins of the doctrine of vicarious liability are true. The difficulty remains that those origins do not control what the doctrine of vicarious liability means (or should mean) nowadays. Originalism makes no sense as a theory of interpretation of the law of torts since the latter is essentially the product of judges rather than of legislatures and was, in any event, not created in one fell swoop. (Of course, originalism cannot make any sense as a theory of interpretation in the United Kingdom, even in constitutional law, since the UK has no written constitution.) So any acceptance of Stevens's contentions regarding the origins of the doctrine of vicarious liability does not commit us to any particular view as to either what the doctrine means now or how it should be applied today. These are therefore matters for him to explain.

Stevens proceeds to make some general observations about the nature of attribution, pointing out that we allow the attribution of an act to a person even though s/he was not morally at fault.¹¹¹ Then he has to grapple with the case law. The first cases he considers are *Staveley Iron & Chem. Co. v. Jones*¹¹² and *Majrowski v. Guy's & St. Thomas' NHS Trust*.¹¹³ It is not a

¹⁰⁹ *Id.*

¹¹⁰ JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 164-66 (2006).

¹¹¹ STEVENS, *supra* note 14, at 260-61.

¹¹² [1956] A.C. 627 (H.L.), *discussed in* STEVENS, *supra* note 14, at 261.

¹¹³ [2006] UKHL 34, *discussed in* STEVENS, *supra* note 14, at 261.

promising start. As Stevens himself acknowledges, "that it is the act and not liability for the wrong which is imputed has been rejected in obiter statements of the House of Lords."¹¹⁴ Stevens also points out that, since his theory of vicarious liability attributes an employee's act to the employer, "it can be argued that the attribution of the employee's act to the employer would lead to the ridiculous result that an employee who carelessly injured himself during the course of his employment could sue his employer."¹¹⁵ This means that Stevens has to carve out an exception to his own general principle for just such an eventuality. A theory which cannot cope with such an everyday issue is problematic indeed.

Returning to the case law, Stevens claims that his theory supports the results achieved much better than current orthodoxy. However, over the next page of discussion, he cites only two cases, and they are both from the nineteenth century.¹¹⁶ He also cites *Thompson v. Comm'r of Police for the Metropolis*¹¹⁷ to show that the level of damages for which the employer is liable may be different from the measure of damages awarded against the employee.¹¹⁸ But it is common ground that the issue of liability is different from determining the quantum of damages. Indeed, that is the whole basis of the law regarding both joint and several liability and comparative fault. So *Thompson* adds nothing to the argument in favor of a "rights conception."

In fact, Stevens cites only three cases decided since World War II which might be said to do that. As will now be explained, even this appearance is deceptive. The first such case is *Broom v. Morgan*, heard in the English Court of Appeal.¹¹⁹ This raised the question of whether a defendant employer could be vica-

¹¹⁴ STEVENS, *supra* note 14, at 261 (citing *Staveley*, [1956] A.C. 627 at 643 *per* Lord Reid; *Majrowski*, [2006] U.K.H.L. 34 at para. 15 *per* Lord Nicholls, at para. 56 *per* Lord Hope of Craighead, at para. 68 *per* Baroness Hale of Richmond, at para. 81 *per* Lord Brown of Eaton-under-Heywood).

¹¹⁵ *Id.*

¹¹⁶ *Chaplin v. Hawes*, (1828) 172 Eng. Rep. 543; *Mills v. Armstrong (The Bermina)*, (1888) 13 A.C. 1 (H.L.) *discussed in* STEVENS, *supra* note 14, at 262 n.96.

¹¹⁷ [1997] EWCA Civ. 3083, *available at* <http://www.bailii.org/ew/cases/EWCA/Civ/1997/3083.html>.

¹¹⁸ STEVENS, *supra* note 14, at 265.

¹¹⁹ *Broom v. Morgan*, [1953] 1 Q.B. 597, *discussed in* STEVENS, *supra* note 14, at 265.

riously liable for injuries suffered by a woman as a result of her husband's negligence when both husband and wife were employees of the defendant. At the time, legislation meant that spouses were unable to sue each other. However, the Court of Appeal held that this immunity was not substantive but only procedural, so that it did not apply to the employer, who was accordingly held liable. *Broom* is clearly consistent with the master's theory rather than the servant's theory of vicarious liability. But *Broom* is over half a century old. While it was given some credence a couple of years later by the Australian case of *Tooth & Co. v. Tillyer*¹²⁰ (which Stevens does not cite), it has been clearly disavowed since then. The Supreme Court of Canada, for example, gave it short shrift in 1988 in *Angus v. Sun Alliance Ins.*¹²¹ Giving the judgment of the Court in *Angus*, LaForest J said that the distinction drawn in *Broom* between a substantive and procedural immunity was "artificial."¹²² He continued:

The provision in question provides a complete defence to an action. Whatever may be the reasons for this, and whether one agrees or disagrees with them, the provision of a complete defence to an action, just as much as the creation of a cause of action itself, is a substantive matter.¹²³

On facts almost identical to *Broom* the employer was thus held not to be liable. Even if *Broom* once did represent the law, it seems as though it was an anachronistic hangover from a previous era, and one which has now been eradicated from the common law. Indeed, it is somewhat odd to be relying on a case that could be decided as it was because of an immunity which has since been abolished. It can only lend support to Stevens's contention as to the origins of the doctrine of vicarious liability, not as to what that doctrine means today.

¹²⁰ (1956) 95 C.L.R. 605, para. 20 (Austr.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1956/49.html>.

¹²¹ *Angus v. Sun Alliance Ins.*, [1988] 2 S.C.R. 256, para. 16 (Can.), available at <http://csc.lexum.umontreal.ca/en/1988/1988scr2-256/1988scr2-256.pdf>.

¹²² *Id.*

¹²³ *Id.* at para. 20.

It is a similar story with another English case, *Twine v. Bean's Express Ltd.*¹²⁴ There a passenger sued a van driver's employer for damages for the injuries he had suffered as a result of the driver's negligence. The passenger was aware that employer had given the driver instructions not to give others a ride, thus making him a trespasser. At the time English common law took the view that an occupier did not owe a trespasser a duty of care. The Court of Appeal therefore refused to make the employer vicariously liable for the driver's negligence on the grounds that this would have the effect of making the occupier liable vicariously in circumstances where it would normally have had immunity. But again *Twine* is over fifty years old. A majority of the Court of Appeal declined to follow it twenty years later in the case of *Rose v. Plenty*.¹²⁵ Indeed, by that time the rule regarding premises liability towards a trespasser had itself been changed (and by the courts themselves, not by legislation).¹²⁶ Even before that, the decision in *Twine* had already been the object of sustained criticism, notably in Australia, where it was asserted that the employer owed the passenger a non-delegable duty.¹²⁷ As with *Broom*, *Twine* is useful for Stevens only to support his contention as to the origins of the doctrine of vicarious liability. It has nothing to offer so far as the current meaning and application of the doctrine is concerned.

The third and final potentially supportive case for Stevens is *Darling Island Stevedoring & Lighterage Co. v. Long*,¹²⁸ an Australian case where the negligence of an individual stevedore was held not to lead to the imposition of vicarious liability on his employer. Stevens claims that: "On the 'servant's tort' theory the result is inexplicable."¹²⁹ But this is simply an inversion of the truth. *Darling Island* is a case of breach of statutory duty, where the statute imposed the relevant legal obligation on the

¹²⁴ [1946] 1 All Eng. Rep. 202, discussed in STEVENS, *supra* note 14, at 263.

¹²⁵ [1976] 1 W.L.R. 141, 141.

¹²⁶ British Rys. Bd. v. Herrington, [1972] A.C. 877 (H.L.), available at <http://www.bailii.org/uk/cases/UKHL/1972/1.html>.

¹²⁷ See, e.g., JOHN G. FLEMING, LAW OF TORTS 442 (3d ed. 1965); *Occupier's Liability*, c. 2, para. 35 (Law Reform Comm'n of New South Wales, Working Paper No. 3, 1969), available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/wp3pt2>.

¹²⁸ (1957) 97 C.L.R. 36, 69-70 (Austr.). See STEVENS, *supra* note 14, at 264.

¹²⁹ STEVENS, *supra* note 14, at 264.

"person in charge." Once the High Court had determined that this phrase was to be construed as referring to the individual actually supervising the operation rather than to the company for which he worked, then the result followed as night follows day; to have found otherwise would have defeated the stated purpose of the statute. Justice Fullager thus declared that:

The position in this case is simply that the plaintiff sues for breach of a statutory duty, and, in order to succeed, he must find not merely a statutory duty but a statutory duty imposed on the defendant. If the defendant can be brought within the expression "person-in-charge" in reg. 31, the plaintiff can find such a duty. But, in my opinion, that expression cannot be construed as including the defendant company. And, in my opinion, that is the end of the matter.¹³⁰

In other words, *Darling Island* is simply concerned with statutory construction. It tells us absolutely nothing about vicarious liability.

Stevens then tries to explain the very recent English case of *Majrowski v. Guy's & St Thomas's NHS Trust*.¹³¹ There the House of Lords was required to rule on whether a health trust could be vicariously liable for the harassment, bullying and intimidation of one of its employees by one of its managers. The House held unanimously that it could. Giving the leading judgment, Lord Nicholls of Birkenhead stated plainly: "Vicarious liability is a common law principle of strict, no-fault liability."¹³² Similarly, Baroness Hale of Richmond explained:

Vicarious liability, as my noble and learned friend, Lord Nicholls of Birkenhead, has so clearly explained, does not depend upon the employer having done anything wrong or even having broken any legal duty imposed upon him. It merely requires that the enterprise pay for damage done by its employees in the course of their employment, a concept which now has a very broad meaning, and certainly embraces conduct which the

¹³⁰ *Darling Island Stevedoring*, (1957) 97 C.L.R. at 56.

¹³¹ See *Majrowski v. Guy's & St. Thomas' NHS Trust*, [2006] UKHL 34.

¹³² *Id.* at para. 7.

employer was actively trying to deter and could have done nothing more to prevent.¹³³

It is thus very clear that their Lordships rejected entirely the agency or “master’s tort” theory of vicarious liability. Indeed, Lord Nicholls made clear that, “[w]hatever its historical origin,” the doctrine currently rests on the idea that “all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise.”¹³⁴

It is therefore a bit rich for Stevens so infelicitously to declare that: “Although this approach fits with academic orthodoxy, it is wrong, although the result . . . is correct.”¹³⁵ The point is surely that the result in *Majrowski* is correct *precisely because* it is entirely consistent with the standard explanation of the doctrine of vicarious liability. Indeed, the whole discussion of the case law on vicarious liability throughout the common law world clearly shows that, while the common law might previously have favored the master’s tort (or agency) theory, it moved over to the servant’s tort theory at least several decades ago. American common law has trodden precisely this path, neatly summarized by Judge Calabresi in *Taber v. Maine*.¹³⁶

The government understandably seeks to rely on an older conception of *respondeat superior*. This view of the doctrine required a close link between the ‘agent’ and ‘profit’ accruing to the master before vicarious liability attaches to the latter. . . . But today this position is in hasty retreat, if not rout As the leading Torts treatise has put it, ‘the integrating principle’ of *respondeat superior* is ‘that the employer should be liable for those faults that may be fairly regarded as risks of [the] busi-

¹³³ *Id.* at para. 68.

¹³⁴ *Id.* at para. 9.

¹³⁵ STEVENS, *supra* note 14, at 264.

¹³⁶ 67 F.3d 1029, 1036 (2d Cir. 1995).

ness, whether they are committed in furthering it or not.¹³⁷

It is now clear that Stevens's approach not only has little normative appeal, it is also implausible as a description of the current state of tort law in any of the major common law jurisdictions. Stapleton's charge of "reverse engineering" could scarcely be more apposite.

III. THE FAILURE OF IDEALIST FUNDAMENTALISM

A. Ideal-Types, Not Immaculate Conceptions

From the foregoing discussion there seems little doubt that the only way to take Stevens's account of tort law seriously is as a purely theoretical construct. Writing at the end of the nineteenth and beginning of the twentieth centuries the German political philosopher, Max Weber, one of the founding fathers of sociology, developed a theoretical methodology whereby he attempted to isolate distinctive features of particular social practices (including law). He called these abstractions "ideal-types." They were ideal not in the sense that they were goals which would be worthwhile to achieve, but in the sense of sets of ideas that were not necessarily "exemplified in reality."¹³⁸ Weber himself put it this way:

An ideal type is formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct . . .¹³⁹

The usefulness of ideal-types is that they facilitate comparison. Thus:

[They] were intended as methodological tools, providing clear, systematic benchmarks for understanding social processes.

¹³⁷ *Id.* at 1036-37.

¹³⁸ DONALD G. MACRAE, WEBER 65 (1974).

¹³⁹ WEBER, *supra* note 18, at 90.

They were not intended as normative models, nor as descriptions of historical phenomena. They should be assessed for their usefulness in illuminating trends and structures ¹⁴⁰

Weber himself employed two series of ideal-types in his analysis of law. One concerned three different and mutually exclusive forms of legitimate political authority—or “domination”—which he called traditional, charismatic and legal.¹⁴¹ While Weber did not claim that political authority in any particular society in practice rests (or has rested) on only one form of domination, these ideal-types did enable him to make some telling comparisons about the different social orders apparent throughout history and in his own time. In particular, he showed that charismatic leadership was short-lived, and that economically-developed societies tended to coincide with legal domination. Additionally, he employed a four-fold classification scheme, based upon the degree of rationality and formality displayed, to analyze the different ways in which societies engage in lawmaking and law-finding.¹⁴² This scheme again enabled him to demonstrate that the most economically advanced societies typically also had the most formal and most rational systems of adjudication—with one exception.

The problem for his model was that arguably the most advanced country of his day was the United Kingdom. Weber’s analysis of English common law found however that, while it was a system of considerable formality, it was significantly lacking in rationality. The absence of codes for either civil or criminal law meant that the answer to many questions of law could not be known until after the event. Indeed, this very issue had prompted Jeremy Bentham, the founder of Utilitarianism, to deride the common law over half a century earlier:

¹⁴⁰ Robert Reiner, *Classical Social Theory and Law*, in *JURISPRUDENCE AND LEGAL THEORY: COMMENTARY AND MATERIALS* 257 (James Penner, David Schiff, & Richard Nobles eds., 2002).

¹⁴¹ MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 328 (A.M. Henderson and Talcott Parsons trans., 1964).

¹⁴² MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* 63 (Edward A. Shils and Max Rheinstein trans., 1954).

It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.¹⁴³

Perhaps Weber's analysis was flawed; he himself attributed the UK's economic development to a Protestant work ethic.¹⁴⁴ Perhaps the UK was—and, without a written constitution, still is—simply unique, and so the rest of Weber's analysis remains valid. Or perhaps Weber just misunderstood the common law and the way that it had undoubtedly changed since Bentham's time. Whatever the best interpretation, what both Weber's critics and supporters have called the "England problem"¹⁴⁵ points up nicely one of the issues on which the success or otherwise of the employment of ideal-types depends. They must themselves be well-chosen so as to provide an insight into the most important alternative conceptions of the human practice under discussion. In this respect Stevens's choice of "loss conception" and "rights conception" fails on two counts. First, the conceptions are insufficient in number to capture all the main, alternative suppositions on which it could be argued that the law of torts is based. Secondly, they are insufficiently distinctive to facilitate meaningful comparisons between them. Yet by focusing on Stevens's preferred "rights conception" and, instead of comparing it with the "loss conception," it is instead treated as one possible ideal-type among several (as yet unspecified) others, then it may prove possible to derive some greater insight.

¹⁴³ JEREMY BENTHAM, *Truth Versus Ashhurst*, in *THE WORKS OF JEREMY BENTHAM* VOL. V 233, 235 (London, Simpkin, Marshall, & Co. 1843).

¹⁴⁴ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 11 (Talcott Parsons trans., 1992).

¹⁴⁵ See, e.g., David Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 *WIS. L. REV.* 720, 748 n.58 (1972); Martin Albrow, *Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law*, 2 *J.L. & SOC'Y* 14, 22 (1975); Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 *LAW & SOC'Y. REV.* 487, 487 (1987).

Ironically, what then becomes clear is precisely the opposite of what Stevens intends. Whatever the other possible conceptions might be, it is surely obvious that the law of torts over the last century or so has moved quite strongly *away* from anything resembling the “rights conception.” Indeed, the cases cited by Stevens in support of his conception are overwhelmingly old, and many have subsequently been distinguished, doubted, ignored or overturned. Indeed, he constantly castigates courts for getting the law wrong since around the mid-1930s. In essence, Stevens is not so much arguing for a re-conceptualization of the law of torts as pleading that we should turn the clock back to supposed halcyon days when the judges articulated views in accordance with his own predilections. He is particularly keen to do away with the tort of negligence.¹⁴⁶ Even the very division of tort law theory into a “rights” and a “loss” conception turns out to have been taken from a debate held a century ago rather than one in which theorists are actively engaged today.¹⁴⁷ Weber, by contrast, did not believe that anything could be done to reverse the trends in social phenomena he identified. Even Karl Marx, with whose ghost it is often said that Weber was debating¹⁴⁸—and who had argued that “philosophers have only *interpreted* the world, in various ways; the point is to *change* it”¹⁴⁹—would never have thought of turning the clock *back*. While a strident critic of capitalism, he nevertheless thought it better than any previous socio-economic system.¹⁵⁰ Stevens is effectively taking on the role of tort law theory’s very own King Canute.

B. The Flaw in Fundamentalist Idealism

Stevens himself paints an apocalyptic picture of what will happen not just to the law of torts but to our legal system more broadly if we do not turn back. It is, of course, in the nature of fundamentalism to believe that the world will disintegrate into

¹⁴⁶ STEVENS, *supra* note 14, at 296, 303.

¹⁴⁷ *Id.* at 301.

¹⁴⁸ See, e.g., REINER, *supra* note 137, at 252.

¹⁴⁹ KARL MARX, *Concerning Feuerbach*, in EARLY WRITINGS 421, 423 (Rodney Livingstone & Gregory Benton trans., 1975).

¹⁵⁰ MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 43 (2000).

anarchy (or worse) unless its own views and value-system are adopted. In this Stevens is simply echoing in torts the views of his near-namesake, Sir James Fitzjames Stephen. Writing over a century ago, Stephen believed that a refusal to apply the force of the criminal law to immoral behavior (even where no-one was harmed) would threaten the rule of law.¹⁵¹ Stephen was wrong then; Stevens is wrong now. Indeed, it is hard to take seriously prophecies of impending doom when the prophet has just spent so much time saying that the factors which will produce legal Armageddon have been in place for the best part of a century.

But it is worthwhile to explore why the law of torts throughout the common law world has been moving away from the "rights conception." Stevens blames legal realism.¹⁵² The problem with this is that it is what, in Weber's own time, would have been called an "idealist" explanation. "Idealism" in this sense again has nothing to do with the pursuit of ideals. Rather, it refers to a perspective which:

[R]egards ideas as primary in legal causation. Accordingly, scholars and judges, as the developers of legal ideas, are the key to legal causation. In this view, social reality is important only in providing the material that the legal system will shape.¹⁵³

In other words, Stevens apparently takes the view that the law has—wrongly, in his view—moved away from anything approaching the "rights conception" primarily because too many judges and legal academics have entertained muddled ideas as to what the law of torts is about. Yet it really is very difficult to believe that, at more or less the same time, much the same set of mistaken ideas simply "popped"—by chance or by choice—into the heads of so many senior judges and legal theorists throughout the common law world. It is hardly deniable that the law of torts on either side of the Atlantic, and in Australia, has

¹⁵¹ JAMES FITZJAMES STEPHEN, *The Doctrine of Liberty in its Application to Morals*, in *LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS* 135, 151 (The Univ. Chi. Press 1991) (1873).

¹⁵² STEVENS, *supra* note 14, at 306-14.

¹⁵³ Jay M. Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722, 729 (1980).

demonstrated remarkable parallels. For example, the judgment which marked the birth of negligence law in the United Kingdom, delivered by Lord Atkin in *Donoghue v. Stevenson*,¹⁵⁴ was delivered within four years of Chief Judge Cardozo's judgment in *Palsgraf v. Long Island Railroad Co.*¹⁵⁵ in the United States. Although the facts of the two cases were very different—nausea and “nervous shock” brought on allegedly by seeing the remnants of a decomposing snail pour out of a half-drunk bottle of ginger beer are not self-evidently similar to being struck by a set of scales on a railroad platform as a result of guards' trying to push another passenger onto a moving train—Lord Atkin's “neighborhood principle” in *Donoghue* and Chief Judge Cardozo's “zone of danger” test in *Palsgraf* are actually remarkably analogous tests.¹⁵⁶

It is much more likely, surely, that these ideas were born of common experience. Changing technology and social circumstances experienced throughout the common law world have conditioned those living within such an environment to think much the same as their contemporaries (wherever they live) but differently from their predecessors. For example, the invention and use of, first, the railroad, and then the automobile has had arguably an even greater role in the development of tort law than did merchant shipping in the law of contracts. Latterly the same might be said of the advent of mass healthcare and the dispensing of powerful pharmaceuticals. More generally, two World Wars in which huge numbers of individuals made the ultimate sacrifice caused ordinary citizens to be less deferential to those in authority, while the public works programs that followed made them more expectant of certain social benefits. At the same time, mass communication and the increasingly rapid pace of technological development require a skilled, well-educated and relatively long-lived populace, both as workers and as consumers. It would be absurd to deny that all these events—and others—have had a significant impact on the

¹⁵⁴ [1932] A.C. 562 (H.L.), available at <http://www.bailii.org/uk/cases/UKHL/1932/100.html>.

¹⁵⁵ 162 N.E. 99, 105 (N.Y. 1928).

¹⁵⁶ See Weinrib, *supra* note 30, at 154-55.

thinking of people throughout the common law world (and indeed beyond). It seems inevitable that they must also have had a significant impact on the operation of the law of torts. Any prescription of what judges and scholars should be doing now must, therefore, take account of these factors.

IV. THE FAILURE OF ECONOMIC FUNDAMENTALISM

A. The Attraction of Economics

This is surely the real reason for the enduring attraction of the economic analysis of law. It is not simply that Richard Posner's economic interpretation of Judge Learned Hand's calculus¹⁵⁷ in *Carroll Towing*¹⁵⁸ provides a neat, albeit simplistic, manner of assessing the standard of care in negligence since, as Benjamin Zipursky has pointed out, *Carroll Towing* was "not itself a negligence case at all."¹⁵⁹ The real draw is that everyone feels that, somehow, the economy must have some impact on the law of torts. Thus jurisdictions which share a common law heritage and which have similar economic systems seem likely to have developed rules of tort law which are consonant with the operation of those very economies, thus making those rules similar too.

It is difficult to believe that lawyers had failed to notice this connection before Posner wrote about it, for Posner's basic insight was certainly not new, even in the 1970s. Representing either end of the spectrum of thought of what used to be called "political economy," Karl Marx, Friedrich Engels and Max Weber had made similar observations way back in the nineteenth century. Marx never really got around to a full discussion of what he called "the really difficult point [of] how relations of production develop unevenly as legal relations. Thus e.g. the relation of . . . private law . . . to modern production."¹⁶⁰ However, his friend, Friedrich Engels, explained more confidently that

¹⁵⁷ Posner, *supra* note 23, at 32.

¹⁵⁸ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

¹⁵⁹ Zipursky, *supra* note 4, at 1999-2000.

¹⁶⁰ KARL MARX, GRUNDRISSE 109 (Martin Nicolaus trans., Penguin Books 1973) (1939).

“law must not only correspond to the general economic condition and be its expression, but must also be an *internally coherent* expression which does not, owing to inner contradictions, reduce itself to nought.”¹⁶¹ Max Weber made a similar claim: “Obviously, any legal guarantee is directly at the service of economic interests to a very large extent. Even where this does not seem to be, or actually is not, the case, economic interests are among the strongest factors influencing the creation of law.”¹⁶²

The problem with the law-and-economics movement is that—like its idealist nemesis—it has taken this intuition beyond plausible bounds. Just as Robert Stevens wants to reduce the law of torts to a particular conception of rights, economically-inclined theorists seek to reduce tort law to a matter of economics. Ben Zipursky argues that:

Posner asked whether negligence law really was a formless charade, whether the concept of negligence was merely an emotive shell covering incoherence. When it was written, *A Theory of Negligence* was intended to provide an emphatic “no” in answer to that question.¹⁶³

The irony is that, in reducing issues in tort law to questions of economics, Posner actually portrays the law as engaged in a much broader charade. He allows such little autonomy to tort law that he is, ironically, guilty of propounding the same dogma of “economism” as was apparent in the early years of the Bolsheviks in the Soviet Union.¹⁶⁴ Law schools there were so preoccupied with the changes brought about by the new economic order that they introduced “a new discipline called ‘Economic Law’ [dominated by economics and only] to the very end of which were relegated a few lectures on civil law.”¹⁶⁵ Some

¹⁶¹ Friedrich Engels, *Letter to Conrad Schmidt*, October 27, 1890, reprinted in KARL MARX AND FRIEDRICH ENGELS, *SELECTED CORRESPONDENCE* 504 (1975).

¹⁶² WEBER, *supra* note 142, at 37.

¹⁶³ Zipursky, *supra* note 4, at 2041.

¹⁶⁴ CHARLES BETTELHEIM, *CLASS STRUGGLES IN THE USSR, FIRST PERIOD: 1917-1923*, at 33 (Brian Pearce trans., 1976).

¹⁶⁵ John N. Hazard, *Foreword* to EVGENY PASHUKANIS, *SELECTED WRITING ON MARXISM AND LAW* xi (Piers Beirne & Robert Sharlet eds., 1980) (alteration to the original).

courses on torts in the United States seem to follow a not dissimilar pattern.

Indeed, it is difficult to avoid the nagging suspicion that, just as in the Soviet Union, the real motivation behind this approach is not so much to describe the current law as to *change* what happens so as to reflect a specific set of goals.¹⁶⁶ For the purposes of this article, the problem with any such normative theory is not that its objectives are open to question (although there is, of course, an enormous literature on this controversy).¹⁶⁷ Rather, the significance of any such normativity is that it necessarily implies that, just like Robert Stevens's "rights model," the law-and-economics approach has little to offer as a predictive or explanatory tool of *current* case law.

Consider, for example, the general rule that prohibits recovery by a plaintiff for "pure" economic loss sustained as a result of wrongful conduct by the defendant. It is exceedingly difficult to see why this is any more efficient than would be the case with a general rule which permitted such recovery. Nor is it clear why it suddenly becomes efficient for a plaintiff to be able to recover for economic loss whenever such loss is a consequence of physical injury or damage. In fact, the combination of these two rules regarding recovery for "pure" and "consequential" economic losses has the somewhat strange effect that the suffering of physical harm makes the defendant liable for both that harm and the economic loss; it is, yet again, rather hard to see what measure of efficiency can justify such a result. Indeed, in *Louisiana v. M/V Testbank* Judge Wisdom took the view that the current position taken by American tort law is actually contrary to the pursuit of economic efficiency. Dissenting from the court's decision to deny recovery for economic loss on the grounds of lack of accompanying physical harm, he argued:

The advantages of this alternate rule of recovery [that would allow recovery for economic loss without the prerequisite of physical damage] are that it compensates damaged plaintiffs,

¹⁶⁶ See Jack M. Balkin, *Too Good to be True: The Positive Economic Theory of Law*, 87 COLUM. LAW REV. 1447, 1477 (1987).

¹⁶⁷ Perhaps the most trenchant critique is Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

imposes the cost of damages upon those who have caused the harm, *is consistent with economic principles of modern tort law*, and frees courts from the necessity of creating a piece-meal quilt of exceptions ¹⁶⁸

B. Economics Gone Wrong

It therefore seems that the law of torts often fails to promote an efficient allocation of resources. Perhaps the reason why the contrary assertion is repeated so often is that many legal theorists make poor economists. They advocate that the law should attempt to mimic the operation of the free market, whose “invisible hand” was eloquently lauded by Adam Smith in a famous passage in *The Wealth of Nations*:

As every individual, therefore, endeavors as much he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labors to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.¹⁶⁹

Taking this as its starting-point, the law-and-economics movement then argues that, since this shows that the free market promotes the interests of society by allocating resources in the most efficient manner, the law of torts should do the same by deciding each case in the way that best promotes efficiency

¹⁶⁸ State of Louisiana v. M/V Testbank, 752 F.2d 1019, 1051 (5th Cir. 1985) (*en banc*) (emphasis added).

¹⁶⁹ ADAM SMITH, WEALTH OF NATIONS 456 (Book IV, ch. 2, 1776).

between the parties.¹⁷⁰ So when an incident occurs in which one person is harmed accidentally at the hands of another, the courts are supposed to look at which party could have avoided the loss more cheaply. If that was the defendant, and if the cost of the latter's taking precautions to avoid the plaintiff's being injured could be said to have been an efficient use of resources, then the defendant should be held liable.¹⁷¹ If, however, the precautions would have involved disproportionate expenditure or if the plaintiff had been better placed to protect her own safety, then her case should be dismissed and she should bear her own loss.

But, as will now be explained, this argument involves a complete misunderstanding of Smith's analysis. It does, in fact, commit three basic errors. First, it fails to appreciate the first rule of sociology. Groups of individuals are not simply the aggregation of those individuals. As a result, although group behavior is of course connected in some way to the conduct of the members who comprise the group, the two are clearly distinct. Failing to recognize this is often known as committing the ecological fallacy.¹⁷² Smith clearly avoided doing so. In the passage cited above, he noted that the "invisible hand" of the free market works because social interests are promoted as a result of individuals pursuing *not* those same goals but *their own* self-interest. Yet the economism of many modern tort law scholars involves taking the social goal of efficiency and requiring that it be applied to the conduct of the individual parties to each dispute. The purpose of so doing is said to be that it promotes optimal deterrence by encouraging individuals to act in the most efficient way, both now and in future. But that is precisely what Smith argues *against*! He explicitly says that when individuals act in a manner designed to promote the interests of society, they are much less effective in so doing than when they pursue their own, independent interests. So the law-and-economics movement has, in fact, turned Smith's analysis on its head.

¹⁷⁰ ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 290 (3d ed. 2000).

¹⁷¹ *Id.* at 291.

¹⁷² W.S. Robinson., *Ecological Correlations and the Behavior of Individuals*, 15 AM. SOC. REV. 351, 357 (1950).

Secondly, tort law economism confuses individual intentions with outcomes. Whatever any particular individual tries to do, there is of course no guarantee that he or she will succeed. An individual's perception as to the best course of action will frequently turn out to be wrong: lack of omniscience is an integral part of the human condition. There is bound to be a significant gap between, on the one hand, an individual's subjective evaluation of the various situations in which s/he finds him- or herself at the time and, on the other, the objective evidence, provided with hindsight in a courtroom, as to what would have been that person's best course of action. This distinction between individual intentions and outcomes is implicit in Smith's analysis. In fact, it is this very distinction which enables him to avoid committing the ecological fallacy. In the passage above, for example, he does not simply move from a discussion of individuals to a comment on society. The most important point of what he is saying is that an aggregation of *individual intentions* produces an overall *social outcome*.

Economism again fails to recognize this. It focuses throughout only on outcomes and, in so doing, it overlooks the significance of Smith's point about individual intentions. Economism argues simplistically that, if the social outcome of efficiency is desired, then that tort law should—and does—create standards designed to promote efficiency in the dealings between each set of individuals who come before the courts. Smith is much subtler than this. His observation that a particular social outcome is the product of individual intentions means that each individual is both free to pursue whatever goals he or she chooses and to pursue them in whatever manner preferred (at least so long as neither end nor means is otherwise illegal). There is therefore neither justification nor necessity for imposing a goal of economic efficiency upon individuals who come before the courts. That would be to impute to them an intention to achieve society's goals—and that, as has already been remarked, is exactly the opposite of what Smith eulogizes.

Thirdly, the economism of tort law scholarship makes the analogous error of assuming that the social outcome of economic efficiency is the product of a social goal. Again Smith says no such thing. The very point of the metaphor of the "invisible

hand” is that there is no overall objective, no collective intent or design. The outcome of social efficiency happens apparently by accident, but since it is an outcome that, by and large, we consider favorable, his point is that we should not interfere with it. This is quite different from saying that we should promote economic efficiency. Yet it is the latter which the economic fundamentalists of tort law actually advocate. It is somewhat ironic that the proponents of the law-and-economics movement—as advocates for the “possessive individualism” of the free market¹⁷³—should apparently be so reliant on a model of human behavior which relegates each individual to the mere cipher of some collective objective! The free market does not impose any such objective; it is simply the place where a multitude of individuals interact with one another with the intention that such interactions will produce mutual benefits—but those benefits can be conceptualized in a wide variety of ways and are themselves contingent on a wide variety of perceptions and motivations.¹⁷⁴ The assumption that capitalism has an overall purpose—even if it might be a good purpose—is just bad economics.

As has already been seen, fundamentalist tort law theory (of whatever hue) has a strong tendency to re-engineer the law to fit a pre-determined pattern. It can now be seen that economic fundamentalism also involves the re-engineering of economic theory. Such re-engineering has led tort law’s economic fundamentalists to making the basic mistake of confusing micro- and macro-economics. Even the Bolsheviks did not do that. Adam Smith’s identification of the “invisible hand” of the free market was part of an argument that the best results are achieved when individuals do what they believe is best for them. Whatever the role of tort law might be, no free market economist could argue that they should have an external criterion imposed upon them as the basis for adjudicating upon any disputes. On the contrary, the law’s role should be to facilitate individual choice

¹⁷³ C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: FROM HOBBS TO LOCKE* 53 (1962).

¹⁷⁴ See, e.g., Paul G. Mahoney & Chris William Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2030 (2001); Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CAL. L. REV. 1281, 1288 (2003).

and decision-making, and allow the parties to pursue whatever goals they choose so long as they do not otherwise break the law. In other words, the role of tort law is essentially to be complementary to the role of contract law.

Oliver Wendell Holmes pointed out over a century ago that: "The object of our study then [of the law] is prediction. . . ." ¹⁷⁵ This was of course part of his famous injunction to view the law from the perspective of the "bad man," which tends to paint the law as being focused primarily on criminal law. In fact, the good man (or good woman) and the neither-good-nor-bad-but-just-your-average-Joe also need to have some confidence in their ability to predict outcomes. While it might seem perverse to say so, Adam Smith's analysis tells us that it does not matter whether that confidence turns out to be justified or not. What matters is that (whatever their motivation) individuals engage in economic activity, because that is what benefits society. So individuals must have sufficient confidence to make decisions and engage in such activity; if the law obscures the picture or causes confusion, individuals will lack the requisite confidence to engage in economic activity, and we all lose out. This arguably explains the point of punitive damages: since they may be awarded against a defendant who acted with intention to cause harm to others or was indifferent to whether he did so or not, it is useful that they cannot be easily estimated in advance. Such unpredictability is perhaps an even greater deterrent to such a potential tortfeasor than would be the case if he were able to predict the precise sum of punitive damages which would be awarded against him for his egregious behavior—even if that sum were very large.

C. Economism and Bad Law

Now that it has been established that the standard law-and-economics approach is based on bad economics, it will come as no surprise to learn that it produces a very strange account of the law. Again, it is possible to identify three basic errors. First,

¹⁷⁵ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1896-97).

economic fundamentalism makes the assumption that the law needs to reflect what is best on economic grounds. It has already been seen that this assumption relies on faulty economics. But it is also faulty on legal grounds. The truth is that the law is often itself a factor in determining what is economically sound. The doctrine of vicarious liability provides an excellent example. If an employer knows that it can potentially be vicariously liable for the acts and omissions of its employees, but not for those of independent contractors, this will inevitably affect the calculation of what is the most economic way for that business to operate.¹⁷⁶ Of course, efficiency is not the only factor to be considered when determining how to organize a business. Convenience and the retention of a loyal workforce are but two of the many other factors which may be involved. Nor are questions of potential liability the only factors to be borne in mind when calculating efficiency: an ability to respond quickly to changes in the market, and an ability to exercise more hands-on control are among many other factors that would have an impact on an employer's calculation of what is likely to be most efficient.

Yet it is undeniable that, in some cases, the line drawn by the law may have such a marked effect on what is most efficient that it becomes the major determinant of how the business is organized. Hospitals are excellent examples. Since a hospital in the United States can be held vicariously liable for the malpractice of its employees, but not usually for any malpractice of doctors who work as independent contractors on its premises,¹⁷⁷ many hospitals choose to engage a large number of their doctors on the latter basis.¹⁷⁸ Conversely, in England and Wales, it has been held that hospitals owe their patients a non-delegable duty of care, so that it is entirely irrelevant whether a doctor who has committed some act of malpractice is an employee or independent contractor.¹⁷⁹ Under those circumstances most hospitals prefer to employ their doctors as employees since (among other

¹⁷⁶ Jennifer Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, in *EXPLORING TORT LAW*, *supra* note 3, at 111, 137-140.

¹⁷⁷ *Hill v. St. Clare's Hosp.*, 490 N.E.2d 823, 827 (N.Y. 1986).

¹⁷⁸ Jennifer Arlen & W. Bentley MacLeod, *Malpractice Liability for Physicians and Managed Care Organizations*, 78 N.Y.U. L. REV. 1929, 1944 (2003).

¹⁷⁹ *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574 (C.A.).

things) it gives them more control over each doctor's working practices. The difference in the legal environment in each case produces a change in the efficiency calculation and, in these cases at least, a difference in standard business practice. These are not instances of the economy shaping the law, but of the law shaping the economy. In such circumstances, it is not possible either to construct or to apply legal doctrine to create the most economically-advantageous result. It is only *after* the law or its application has been settled that it is possible to work out what the most economically beneficial way of behaving might be.

Secondly, at the same time as they make this faulty assumption about the relationship between law and economics, the lovers of economism are also struck by the curse of fundamentalist blindness. This causes them to overlook an obvious truism. A court is nothing but a part of government. It is therefore somewhat self-contradictory for free-market advocates to argue that courts should impose a particular, substantive criterion for determining the outcome of cases. It is anathema to such theorists to have government dictate the appropriate standards of behavior, rather than having them determined by private individuals themselves. It should be no more appropriate to have the law impose economically-based criteria such as efficiency than it to have it impose criteria based on welfare or distributive justice. The idea of having the courts impose on the general population a criterion of reasonableness which reflects economic efficiency is thus as absurd as having economic fundamentalists tell professional basketball players that they are permitted to score points only by means of three-point shots since these require no more effort (and only a slightly increased risk of failure) for more gain than two-point shots. The true role of the law of torts is to provide a framework of rules within which individuals can decide for themselves what risks are worth running.

Unlike many instances of contract law, those which come under the rubric of the law of torts often occur in circumstances which give one (or perhaps both) sides in the subsequent dispute little chance to decide in advance how they would like the relevant risks to be distributed. This is where juries come in: as the representatives of the local community, they exist to provide

a standard of reasonableness which reflects the values of that community. This acts as the best available surrogate for what the parties themselves would have chosen if they had had the opportunity to make a choice. But this very role of the jury highlights the third mistake made by economic theorists of tort law. Ironically, this is the same mistake as that made by Stevens in failing to recognize which questions are matters of law for the court and which are matters of fact for the jury.

If there were really just the one criterion of efficiency in determining what is reasonable in the law of torts, then this should surely be a question of law for the court.¹⁸⁰ In fact, of course, it is a matter of fact for the jury. This means that the jury may use whatever criterion of reasonableness that it collectively determines to be appropriate in the circumstances of the case. There is absolutely no warrant for asserting or assuming that the jury will latch onto economic efficiency as the appropriate criterion. Indeed, there is every reason to believe that, aside from cases of purely financial loss, this is the one criterion which they are extremely unlikely to use. Identification of economic efficiency implies some cold calculation. A jury is surely much more likely to make a more visceral judgment. Cold, intellectual calculation is the province of the judge. Yet questions of law for the court to determine in a torts case, such as whether a duty of care was owed under the tort of negligence, do not address the issue of economic efficiency at all.

Any theory which purports to explain the operation of the law of torts must clearly explain why the judge is given the responsibility for certain questions, while others are given to the jury. It must also explain how the judge determines the answer to the set of questions which are his or her responsibility, while also explaining why the jury is given such wide discretion in its own decision-making. Economic fundamentalism treats every issue in a torts dispute as part of a homogenous whole, and so is blind to each of these issues. Its re-engineering of the law of torts thus goes well beyond providing new explanations for individual cases just so that they fit the theory; economism's narrative account of the law of torts as a whole is essentially mystical.

¹⁸⁰ Goldberg, *supra* note 9, at 555-56.

V. TOWARDS A THREE-DIMENSIONAL THEORY

A. Rejecting Fundamentalism

It is clear that neither Stevens's rights theory nor Posnerian economism can explain vicarious liability. Both types of reductivism fail miserably to explain why a plaintiff in a public nuisance claim needs to piggy-back on harm suffered by others who cannot themselves bring suit. Nor do they offer plausible accounts of developments regarding the law of actual and proximate causation, such as the idea that materially increasing the risk of harm may sometimes be substantively the same as causing loss,¹⁸¹ or that loss of a chance of some potential benefit is as recognizable for the purposes of tort law as physical or economic loss.¹⁸² Basic assumptions are also left wholly unexplained. Why, for example, does lying to a lover not amount to a tort when it seems to fit all the requirements (especially once loss of a chance is recognized) either of fraudulent misrepresentation or of the negligent infliction of emotional distress? Can it really be a matter of economic efficiency? And, if corrective justice has any meaning, why are we apparently under no obligation not to mislead those who rely so closely upon us? Robert Stevens says explicitly that there is a right not to be lied to,¹⁸³ yet he offers no explanation as to why we cannot sue deceitful lovers. Even explanations as to why tort liability is sometimes strict yet, on other occasions, requires proof of fault are generally very weak. Indeed, for that very reason some theorists have argued for strict liability across the board.¹⁸⁴ But such advocacy for change just emphasizes the inadequacy of reductivist theories as explanations for the law that we currently have.

Swapping an opaque problem for an opaque answer is hardly progress. But reductivist approaches are found wanting not only at the level of specific details. Such reductivism is completely at odds with the heterogeneity of the methods by which

¹⁸¹ RESTATEMENT (SECOND) OF TORTS § 323 (1965); *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008, available at <http://www.bailii.org/uk/cases/UKHL/1972/7.html>.

¹⁸² *Falcon v. Memorial Hosp.*, 462 N.W.2d 44, 52 (Mich. 1990).

¹⁸³ STEVENS, *supra* note 14, at 8.

¹⁸⁴ Notably, Calabresi, *supra* note 34, at 13.

the law seeks to put into effect these supposed economic or idealist goals. To put this another way, why does the law of torts comprise so many different torts if it is really about the pursuit of just one objective? Surely, if the engine of tort law were just economics, or rights, or corrective justice, the law of torts would take just the one form that best served the appropriate master. Similarly, as Jane Stapleton has pointed out, because this form of tort "theory is typically culturally blind, it also fails to address the phenomenon throughout the common-law world that there are major differences in the ambit of tort entitlements."¹⁸⁵ So even if torts with similar names are recognized in the US, UK, Canada and Australia, for example, it is not at all clear that cases with identical facts will yield identical results. As has already been shown, the trends in the law of defamation on either side of the Atlantic seem to be moving in opposite directions. Indeed, the federal nature of the United States means that the issue of different application of apparently similar laws is regularly in evidence from state to state. Yet reductivist approaches barely even acknowledge this.

These objections to economism and idealist reductivism are hardly new. Nor are they difficult to identify: experience demonstrates that novice students can point them out in class without much encouragement. The question therefore is why do so many intelligent scholars spend so much time on reductivist theories which have consistently proven inadequate to the task. The uncomfortable suspicion is that both economism and idealist reductivism have moved well beyond the level of theory. Each school of thought has now become so firmly entrenched that adherence to one or other has become a matter of faith. They have, in other words, become emblems of fundamentalist dogma. Scholarship must not allow itself to be shackled in this way.

It is time to revisit the basic assumption underlying fundamentalist tort law theory. Richard W. Wright was quoted earlier as saying that "a successful normative and descriptive theory of law should at least be able coherently to explain and justify the principal features of the existing law. Only a monistic foundational theory holds out any prospect of being able to do

¹⁸⁵ Stapleton, *supra* note 3, at 266-67.

so.”¹⁸⁶ By now, however, it should be apparent that this is actually the reverse of the truth. In fact, a monistic theory is the only type of theory which has *no* prospect of being able to explain and justify the existing law. As in many other areas of life, fundamentalism is poisoning legal scholarship.

B. Compromise Theory

To everyone bar the fundamentalists, it is obvious that *both* economics and ideas of rights and justice have some role to play in explaining and justifying the current law of tort. Any successful theory of torts will need to take account of *both* these two factors—and perhaps of more besides. For example, while Stevens apparently believes that “the rights we have and their scope need to be determined without reference to insurance concerns,”¹⁸⁷ it is difficult to believe that the widespread availability of liability insurance has not had some influence on tort law, even if it is not necessarily either direct or overt. Max Weber himself was strongly against reductivist accounts of social practices. As noted above, he found that the rise of certain countries as major economic powers could not be attributed solely to the formal rationality of their respective legal systems, since the most powerful country of his time, the United Kingdom, utilized a common law system which was significantly less rational than the civil law system of Germany and other economically-powerful continental European countries. (Would-be tort reformers in the United States would do well to take note.) Weber argued that another factor was also at work, the Protestant work ethic.¹⁸⁸ In other words, he attempted to produce a theory of social change which acknowledged both economic factors and the influence of ideas. Of course, recognizing what tort law theory must do and being able to accomplish it are very different things, and bringing together the influences of the economy and of ideas of rights or justice is a very difficult task. As Edward White has said: “the relationship between dominant ideas or values and ‘significant’ events in the history of a profession is

¹⁸⁶ Wright, *supra* note 11, at 160.

¹⁸⁷ STEVENS, *supra* note 14, at 109.

¹⁸⁸ WEBER, *supra* note 144, at 11.

extraordinarily complex and difficult to characterize.”¹⁸⁹ This is probably a major reason why so few have attempted to do so.

One person who did attempt the task was that epitome of reason, the late Gary Schwartz.¹⁹⁰ The problem, as he acknowledged, is that any theory which suggests that “tort law imposes or assigns liability for proper deterrence reasons—unless this result is not compatible with the criterion of corrective justice”¹⁹¹ or its converse, whereby “corrective justice [is] the criterion guiding liability-rule choices, subject to the constraint that these choices be compatible with proper deterrence policy”¹⁹² must, if it is to avoid a total impasse, essentially just collapse back into one or other theory. Mark Geistfeld’s recent attempts to reconcile fairness and efficiency, for example, simply end up by conceiving fairness only in economic terms.¹⁹³ Schwartz also noted that any such compromise theories will struggle to explain such important aspects of tort law as causation, landowners’ liability to trespassers and suits for wrongful death.¹⁹⁴ His explanation regarding vicarious liability was not altogether convincing either.¹⁹⁵ In the end, Schwartz concluded that “it may be difficult, then, to develop a mixed theory that can account for all of tort law. . . .”¹⁹⁶

Schwartz was not, however, finished. He declared that: “A *partial* mixed theory . . . merits discussion.”¹⁹⁷ He proposed that negligence law, at least, be seen “as a practice which, at stage one, seeks to deter negligence generally, yet which then, at stage two, acknowledges the incomplete success of its stage-one effort and accordingly recognizes the corrective justice rights of those who have been victimized by negligence.”¹⁹⁸ Deterrence

¹⁸⁹ G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 97 (1978).

¹⁹⁰ Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802 (1997).

¹⁹¹ *Id.* at 1824.

¹⁹² *Id.* at 1825.

¹⁹³ Mark A. Geistfeld, *Efficiency and Fairness in Tort Law* 43 (N.Y.U. Law & Economics, Working Paper No. 48, 2006), available at <http://lsr.nellco.org/nyu/lewp/papers/48>.

¹⁹⁴ Schwartz, *supra* note 190, at 1825.

¹⁹⁵ *Id.* at 1825.

¹⁹⁶ *Id.* at 1826.

¹⁹⁷ *Id.* at 1826 (emphasis added).

¹⁹⁸ *Id.* at 1828.

and corrective justice are thus transformed into complementary rather than competing goals. Promising as this may look at first sight, further examination reveals that even this partial theory must still collapse into one or other form of reductivism. To give one example, there is the question of which doctrine in the law of negligence provides the deterrence factor, and which provides the corrective justice element. Economism emphasizes standard of care (breach of duty) as the doctrine which establishes the appropriate standards of behavior. By contrast, idealist reductivism stresses duty of care as the mechanism which best promotes corrective justice or the protection of individual rights. So, according to Schwartz's tentative proposal, standard/breach might perform the deterrence function and duty the corrective function.

However, duty is also essential to any appropriate understanding of deterrence. If proof of duty is required, any organization engaged in a risk assessment of its activities will inevitably evaluate not just the likelihood that each process may itself go wrong, but who would then be liable to be injured and able to bring a claim. So it seems that duty performs a dual function. Unless a duty is owed to everyone, this means that the deterrence function of standard of care is significantly undermined by the requirement of proof of duty. So long as any injuries suffered are sustained by those to whom no duty is owed, then any behavior is acceptable to the law of torts, even if it falls well below the standards apparently required by the doctrine of standard of care. Any organization that determines that only such injuries are likely—for example, a petro-chemicals company which can identify no-one with a sufficiently tangible interest in certain waters as to be able to bring suit in the event of an oil spillage¹⁹⁹—is then subject to no deterrent effect whatsoever. The compromise theory thus turns out, once again, to be reducible to just one of its supposedly two constituent elements.

Schwartz's proposal fails ultimately because it is incapable of generating a theory of change. Trying to run two goals of tort law along the same level of abstraction means that the nearest to a theory of change that can be achieved is some sort of oscilla-

¹⁹⁹ See *Louisiana v. M/V Testbank*, 752 F.2d 1019, 1032 (5th Cir. 1985).

tion up and down the scale: a little more liability here, a little less liability there. As Stapleton again has pointed out:

[M]any . . . “pure” theories of law . . . fail[] to expound a convincing rationale of the core characteristic of the common law system, namely, the dynamic evolution of legal entitlements based as they are on shifts in what are perceived as acceptable forms of distributive justice: the redistributive nature of *Macpherson* is again a good example.²⁰⁰

Simply combining deterrence and corrective justice does not explain why the court in *Macpherson*—subsequently followed in England by the House of Lords in *Donoghue v. Stevenson*—decided effectively to reconceptualize both those notions. Thenceforth, a manufacturer owed a new duty to a consumer with whom it had no contract—a change in the nature of corrective justice—and could thus perceive a new deterrent. Re-conceiving of *Macpherson* and *Donoghue* in terms either of rights or of efficiency takes us no further since neither school of fundamentalism is able to explain why the rights of consumers should have been expanded, or why the imposition of this additional liability in tort is more efficient or just than reliance on liability in the law of contract alone. A compromise theory which is made up of two elements, neither of which have anything to offer in explaining arguably the two most prominent cases in the canon of the common law of torts, will inevitably prove to be a dead-end.

C. Three-Dimensional Tort Law Theory

This does not mean, however, that some overall theory of the law of torts is either unnecessary or impossible. So long as we believe that any body of law is more than just a series of unpredictable, *ad hoc* adjudications, it follows that it must have some element of system to it. System-building is at the heart of the legal enterprise. Without some form of system, decision-making would be both arbitrary and irrational. It is the job of theory to identify the themes underlying this system and which

²⁰⁰ Stapleton, *supra* note 3, at 266.

act as the glue holding it all together. But we are still searching for an appropriate theoretical model.

A glimpse of what is required can be obtained if we reconsider the demise of meaningful legal scholarship in the early days of the Soviet Union. As mentioned already, the dominant legal theory among the Bolsheviks of the 1920s and 1930s was the dogma of economism. This essentially relegated the study of law to an offshoot of the discipline of economics. As bourgeois market relations were replaced by Soviet-style public ownership of the means of production, it was thought that law would wither on the vine. There was therefore relatively little point in studying it independently. As the late John Hazard remembered from his own days there at the time:

[This] theory held that Soviet legislators and jurists were not creating a proletarian or socialist system of law, but were merely putting to their own use the bourgeois law that they had inherited. Thus, there was no new legal form in process of creation, but only a transformation by degrees of content to meet the needs of those engaged in creating Soviet public order during the limited period required for the state and its handmaiden, the law, to wither away with the achievement of a classless society.²⁰¹

It became apparent relatively quickly, however, that this dogma was incompatible with what was actually happening in the Soviet Union. Rather than the role of law diminishing, it actually expanded substantially. A new theory was required, which allowed for the creation of a new *form* of law, namely Soviet law.

The same error is being repeated within modern tort theory. Fundamentalists on both sides focus almost exclusively on the *content* of the law. Since this proves repeatedly to be futile, non-fundamentalists become skeptical of the whole theoretical endeavor²⁰² to the extent that Stapleton has derided it as

²⁰¹ Hazard, *supra* note 165, at xi-xii.

²⁰² See, e.g., PETER CANE, *THE ANATOMY OF TORT LAW* 21 (1997).

the "carrot puree of high theory."²⁰³ The basic point hitherto missed by so many theorists is that, like any other body of law, tort laws take a particular *form* as well as a certain substantive content. This is not the same as saying that the law takes on one appearance to mask the fact that it is actually doing something else. This is where the legal realists went wrong. In pointing out the undoubted fact that formal rules do not tell the whole legal story, they threw the baby out with the bathwater and essentially dismissed rules as a smokescreen. But, in fact, the form of law does matter. Statutes of limitation and repose are clearly important, for example, yet they speak only to formality and not to the substance of a dispute. In tort law, more specifically, it is important to explain why different torts require proof of different elements; why some are fault-based and others are not; why some require proof of harm while others presume harm; and why distinctions are drawn between different types of harm, or between misfeasance and nonfeasance. Indeed, an explanation for the existence of a plethora of different torts is also required. Thus far, the tendency has been to look at these issues only as matters of differing substance. But the various doctrines described here tell us nothing about the quality of individuals' behavior or of what society demands of each of us. They are concerned only with the conceptual categories which the law employs—and, *pace* the realists, it really does employ—to transform an instance of social discord into a legal dispute.

By its very nature, reductivism sees legal disputes as essentially the same as social disputes except for the fact that they are played out in a legal arena (typically a courtroom). But this is simply not an accurate depiction of how a torts case works. Arguments for both plaintiff and defendant must be translated into legal form. This means not simply that a vocabulary unfamiliar to the lay person is employed, but that what might seem to that person to be perfectly normal reasoning or justification may be deemed inadmissible in a legal forum. So while individuals routinely rely on information passed on to them by inter-

²⁰³ Stapleton, *supra* note 3, at 267. Why high theory is a puree of carrot rather than some other vegetable is a matter for conjecture. Perhaps it will enable us to see through the dark of tort law. Currently it might be likened more appropriately to pea soup.

mediaries (whether through professional channels such as the news media, or just through gossip) hearsay evidence is normally excluded from a torts trial. A case which a particular individual wishes to bring against a state or federal government may be denied simply because of sovereign immunity, without any inquiry into the substantive merits of the case. A suit for personal injury against an employer may focus not on the conduct of the individual who caused the injury, but on the formal matter of whether that person was an employee acting in the course of employment by the defendant employer. These formal matters constrain and guide the law of torts just as much—and sometimes more than—substantive questions as to the efficiency of certain conduct or the implications for the notion of justice of the parties' relationship.

It is vital, therefore, for any meaningful theory of torts to explain and justify both its content and its form. Reductivist theories are clearly unable to do so. That is why they fail. But the fact that form and content operate in different ways means that it is now possible to conceive of a manner in which arguments of corrective justice and of economics might fruitfully be combined. One metaphor for this combination could be a graph where the x axis represents form and the y axis represents content (or *vice versa* if preferred). The state of the tort laws in any given jurisdiction at any given time can then be envisaged as a point on the graph whose co-ordinates are set by a particular combination of form and content. This automatically overcomes the problem identified by Stapleton, whereby tort law theory fails to recognize differences in tort law across different jurisdictions. Indeed, since the number of possible combinations of form and content seem—at least on a graph—to be infinite, theories of tort law which explain both would tend to expect different jurisdictions to adopt different specific rules, even where many of the broad principles turn out to be very similar. Whatever theories turn out to be capable of explaining these combinations, it is clear that they cannot be reductivist.

It is important to emphasize that form is synonymous with neither corrective justice nor efficiency. Content too is not simply a reflection of economic or idealist factors. The metaphorical graph does not represent particular combinations of corrective

justice and economics. That would involve lapsing back into what we have already seen to be untenably fundamentalist reductivism. On the contrary, there is constant interplay between form and content, which means that the law of torts develops a degree of autonomy from external, economic and idealist influences. Even if the economy were static and ideas of corrective justice were similarly immutable—which is the picture often painted by fundamentalist theorists—the law would still be in flux because it is continually required to provide internally coherent and consistent answers to a wide variety of novel situations. Past principles must be developed, new exceptions or defenses created, unworkable solutions abandoned. Whether an issue is, for example, seen as falling under the rubric of contract, torts or—as is becoming increasingly fashionable—unjust enrichment will often yield a different answer to an identical problem. Yet a movement away from torts towards unjust enrichment is perfectly capable of taking place without any need for external stimuli (whether economic or idealist in origin). The flaw in the metaphor of a graph is that any theory of torts which purports to explain both content and form actually requires a third dimension—that of time. Since it must explain not only how tort law responds to the differing external demands of economics and rights, but also how it responds to this constant internal interplay of form and content, this sort of theory is bound to be a theory of trends. To put this another way, any meaningful theory of tort law must explain how the form of the law mediates external influences so as to provide a body of rules and principles that is both identifiable and reasonably consistent.

An attempt to sketch what three-dimensional tort law theory might look like must wait for another day. Yet it can confidently be said that the fact that it does not decry change, but expects and embraces it, will inevitably require the re-evaluation of two key, conventional assumptions in addition to those already discussed. First, the idea that appellate cases are decided regularly on grounds of “policy” will need to be subjected to more rigorous scrutiny. If these apparently policy-oriented decisions turn out, on further inspection, to be moving the law in a more-or-less consistent direction, then the label “policy” may well turn out to be no more than a sloppy short-

hand for a theorist's own inability to explain a particular line of cases. In other words, what is currently dismissed as "policy" may actually be consistent—albeit hitherto unarticulated—legal principle. If the theory being offered is one of description rather than one of prescription, that surely points more strongly in the direction of a flawed theory rather than of a wrong turn taken by the courts. Corrective justice scholars such as Ernest Weinrib regularly chide the Supreme Court of Canada, for example, for resorting to policy arguments when deciding whether or not a duty of care exists in the tort of negligence,²⁰⁴ but fail to see that the Court has actually produced a series of highly consistent decisions. Consistency implies some force at work—whether internal to the law or external (economic or idealist)—which it should be possible to articulate more clearly in a systematic theory than has been achieved hitherto. The fact that they follow a consistent *trend* rather than hold the law consistently at one fixed point seems to fox many scholars at present. But a theory that expects change should find such trends much easier to explain, and is therefore less likely to feel the need to dismiss large numbers of cases as being decided on "policy" grounds.

Secondly, the assumption that every doctrine of law needs to be explained by the same factor can happily be abandoned by three-dimensional tort theory. While there is no reason to suppose that economics only has an influence on the law's content, for example, there is equally no reason to think that it must have an influence on every tort law doctrine. Does economics really have an influence, for example, on the range of defenses available to someone sued for defamation? Similarly, there is no reason to think that corrective justice considerations must somehow have a part to play in shaping every tort law doctrine. Do they really influence whether the law recognizes emotional distress or loss of a chance as compensable forms of harm (as opposed to influencing what remedies the law might grant if they are so recognized)?

It is time to abandon the fervor with which too many scholars stick religiously to dogmatic theories which have been shown on many occasions to be inadequate to the task. Tort law

²⁰⁴ Weinrib, *supra* note 30, at 165.

is a complex and heterogeneous beast; it requires a model incorporating several causal factors in order to be able successfully to explain and justify it. Theory is not simply about conceptual elegance. It is about trying to make sense of the world around us. Fundamentalist theories are no help at all in enabling us either to recognize tort law as it currently stands or to predict the outcome of future cases in real courts. A three-dimensional model which takes notice not just of ideas of justice and of economics, but also of the interplay within the law itself of matters of internal form and external content, stands a much better chance of doing so. A theory which could actually be useful in practice would make a pleasant change. The challenge now therefore is to develop the three-dimensional model before fundamentalism leads us any further astray.

WHY WE NEED A SUPERFUND FOR HEDGE FUNDS

*Dale B. Thompson**

INTRODUCTION

For years, many people believed that financial markets behaved similar to the pin-makers in Adam Smith's *The Wealth of Nations*: traders who sought financial rewards for themselves also ended up providing economic benefits for the entire nation, as if guided by an "invisible hand."¹ However, the events of this past year have led people to drop this notion of the performance of financial markets as inherently efficient. Instead, now, many are making calls for new and more powerful regulation of financial markets. It is thought that this regulation is necessary to prevent (or at least greatly reduce) future financial calamities.

One financial sector that faces pointed calls for regulation is hedge funds. Hedge funds are primarily a mechanism used to pool a large quantity of funds for investment from individuals that can bear a significant amount of risk. Then, because they operate outside of most regulatory restrictions, hedge funds invest these funds in risky enterprises, including the development of new financial instruments.² In doing so, these funds seek returns that "beat the market." They have become very popular with assets somewhere between one and two trillion dollars.³

The reason for this focus on hedge funds is that, at present, they are relatively unregulated compared with almost all other

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¹ Smith's invisible hand was the market price, which provided signals to both producers and consumers.

² New instruments themselves can involve significant risks, because of the lack of experience with them.

³ See Louise Story, *Hedge Funds, Unhinged*, N.Y. TIMES, Jan. 18, 2009, at BU1.

financial sectors.^{4,5} Antifraud statutes⁶ apply to hedge funds, and some hedge funds are required to report some of their holdings quarterly.⁷ However, the structure of a hedge fund is designed specifically to enable it to avoid registration requirements, along with restrictions on investment strategies that apply to other financial sectors. The principal justification for the lack of regulation of hedge funds was the restriction on participation in a hedge fund to those who had the financial resources to bear the high risk of its activities. It was thought that this restriction would be sufficient to protect the public.

Nonetheless, the events of the past year have shown that there can be significant negative effects on the entire economy that arise due to investment errors made by a hedge fund. As a result, there have been many proposals to regulate hedge funds much more tightly. These regulations could include the imposition of reserve requirements, significant disclosure, and restrictions on investment strategies.

This article suggests that this approach is not the correct one to protect the public from the effects of hedge funds. Instead, using comparisons with our experiences with environmental regulation, this article proposes that the appropriate instrument to address hedge funds is a "Superfund." With the Superfund, a tax would be collected from hedge funds, and the revenues from this tax would then be used to purchase distressed financial assets when market failures arise due to prob-

⁴ Recently, the major investment banks either went into bankruptcy, were acquired by commercial banks, or themselves became bank holding companies. Consequently, the other remaining relatively unregulated financial sectors are private equity and venture capital. See Brian G. Cartwright, Gen. Counsel, United States Securities and Exchange Commission, *Speech by SEC Staff: The Future of Securities Regulation* (Oct. 27, 2007), available at <http://www.sec.gov/news/speech/2007/spch102407bgc.htm>.

⁵ It should be noted that this article deals only with the risks generated by the hedge fund sector. Other financial sectors cause similar risks, but they also operate under some form of regulatory control. In the future, it might be possible to extend the Superfund structure proposed by this article for hedge funds to these other sectors.

⁶ Fraudulent behavior related to the sale of any security, including those held by hedge funds, is prohibited by 15 U.S.C. § 78 (b) of the Securities Exchange Act of 1934 and 17 C.F.R. § 240.10b-5.

⁷ Under 17 C.F.R. §240.13f-1, hedge funds with greater than \$100 million in assets under management are required to submit quarterly reports of some of their holdings. However, no disclosure is required for securities that are not publicly traded. See <http://www.sec.gov/divisions/investment/13ffaq.htm>.

lems with liquidity and valuation. The magnitude of this tax would be determined by the amount of liquidity risk⁸ posed by the portfolio choices of the hedge fund. Consequently, the imposition of this tax would provide incentives to reduce liquidity risks.

In addition to developing a technique for addressing the social costs of hedge funds, this article also posits an arguably new category of market failure: this market failure exists when market prices fail to provide adequate information about valuation of the underlying good. This market failure is related to other traditional market failures: the consequences of imperfect information and market power. However, discussion of imperfect information as a market failure examines the effects of transaction costs in obtaining information about the non-price characteristics of goods and services, while discussion of market power focuses on inefficient market quantities and corresponding prices.⁹ In contrast, this article highlights the consequences of market prices that no longer provide information about valuation. As with other market failures, this particular failure presents an opportunity for governmental intervention to correct it. One possible mechanism for intervention is for the government to provide limited funding for a competitive market in distressed assets.¹⁰

By addressing both market failures caused by the activities of hedge funds, the Superfund suggested by this article offers a superior alternative to extending command-and-control regulation to the financial sector of hedge funds. In the rest of this article, we begin with a description of the characteristics of hedge funds and then examine the academic and policy literature addressing their regulation. After that, we describe the market failures that can result from the operation of hedge funds, including the new market failure concerning valuation problems.

⁸ Liquidity risk is a particular form of "systemic risk," which covers all forms of risks to the entire financial system. See *infra* Part IV. A. For more on systemic risk, see Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 248 (2008).

⁹ See KARL E. CASE AND RAY C. FAIR, *PRINCIPLES OF MICROECONOMICS* (6th ed. 2002), at 258-59 and 263-64.

¹⁰ This idea of a competitive market was first proposed by Lucian Bebchuk. See Lucian A. Bebchuk, *A Better Plan for Addressing the Financial Crisis*, 5 THE ECONOMISTS' VOICE (2008), available at <http://www.bepress.com/ev/vol5/iss5/art6>.

We then examine potential mechanisms for addressing these market failures, including command-and-control regulation and the Superfund for hedge funds. We conclude with an analysis of how the Superfund for hedge funds would operate, along with a discussion of the role of international coordination in developing an effective solution.

I. WHAT ARE HEDGE FUNDS, AND WHAT DO THEY DO?

As a consequence of their predominantly unregulated status, there has not been a formal, universally-accepted definition of a hedge fund.¹¹ In the *Goldstein v. S.E.C.* case, the D.C. Court of Appeals noted, “Hedge funds’ are notoriously difficult to define. The term appears nowhere in the federal securities laws, and even industry participants do not agree upon a single definition. The term is commonly used as a catch-all for ‘any pooled investment vehicle that is privately organized, administered by professional investment managers, and not widely available to the public.’”¹² Meanwhile, a report to Congress describes a hedge fund as “a privately offered investment vehicle that pools the contributions of its investors in order to invest in a variety of asset classes.”¹³ Hedge funds typically collect two types of fees, a management fee (based on the value of assets managed) and a performance fee (based on the level of profits).¹⁴

¹¹ Frank Partnoy and Randall Thomas, *Gap Filling, Hedge Funds, and Financial Innovation* (2006), 22, available at http://www.brookings.edu/ES/RESEARCH/projects/t5/2006tc_partnoy.pdf; also in, *NEW FINANCIAL INSTRUMENTS AND INSTITUTIONS* (Robert E. Litan and Yasuyuki Fuchita, eds. 2007).

¹² *Goldstein v. SEC*, 451 F.3d 873, 874-75 (D.C. Cir. 2006) (citation omitted).

¹³ Secretary of the Treasury, Federal Reserve Board, Securities and Exchange Commission, and Commodity Futures Trading Commission, A REPORT TO CONGRESS IN ACCORDANCE WITH S 356(C) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT) (2002), in JERRY W. MARKHAM AND THOMAS LEE HAZEN, *CORPORATE FINANCE, CASES AND MATERIALS* (2nd ed. 2008), at 883.

¹⁴ A typical fee structure would be one percent for the management fee, and twenty percent of profits for the performance fee. See Alexander Ineichen and Kurt Silberstein, *AIMA's Roadmap to Hedge Funds*, Nov. 2008, 29, <http://www.aima.org/download.cfm/docid/6133E854-63FF-46FC-95347B445AE4ECFC>. While a twenty percent fee for profits seems high, there are certain benefits to this structure because this equity share provides a stronger incentive for hedge fund managers to take a long-term perspective, in contrast to the bonus structure utilized for traders at investment banks. This

These descriptions suggest certain characteristics of hedge funds. Hedge funds invest in certain asset classes including derivatives¹⁵ and short-selling¹⁶ of securities, investments that are not always available to other financial sectors such as mutual funds. In order to maintain their access to these assets, hedge funds must be designed in a way such that they do not come within the purview of the securities laws (other than the anti-fraud provisions). They do this by restricting the number of their investors and by restricting investors to those with high net-worth.¹⁷

As a result of their design and consequent exemption from securities registration and regulation, hedge funds can pursue a wider variety of investment strategies. These strategies can include “convertible arbitrage, distressed securities, equity hedge, . . . event driven, macro, . . . and relative value arbitrage.”¹⁸ Convertible arbitrage is where a fund tries to take advantage of what it believes to be a pricing error between a security convertible into common stock and the underlying security. Another strategy is where a fund invests in the securities of a company that is in distress. Equity hedge is where the fund matches long holdings of stock with a hedged portfolio of short sales of related stock or indexes. Event driven funds make predictions about the possibility of a major corporate event such as a merger or bankruptcy and, based on these predictions, acquire either long or short positions in the affected stock. Macro funds allocate in-

fee structure can therefore lessen liquidity risks that might be generated by hedge funds.

¹⁵ The value of a derivative depends upon an underlying primary security. Two commonly used derivatives are put and call options, which give the buyer of the option respectively the rights to sell and buy the underlying security at a given price during a specified time frame.

¹⁶ A short sale is when a security is initially borrowed and immediately sold to generate cash, with the promise to deliver the exact same type of security to the original holder at a specified time. A short seller makes a profit when the price of the security declines between the original borrowing and the ultimate re-delivery. Under Regulation T, the Federal Reserve has a margin requirement of “150 percent of the current market value of the security” in a short sale. 12 C.F.R. § 220.12 (c)(1), 63 Fed. Reg. 2827 (Jan. 16, 1998).

¹⁷ Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(51)(A).

¹⁸ Hedge Fund Research, Inc., *HFRX Strategy Definitions*, available at <https://www.hedgefundresearch.com> (select “HFRX Indices” tab; then follow “HFRX Indices;” then follow “HFRX Index Descriptions.”).

vestments based on predictions of foreign exchange rates and international stock markets. Relative value arbitrage funds “take offsetting long and short positions in similar or related securities when their values, which are mathematically or historically interrelated, are temporarily distorted.”¹⁹

To take full advantage of these strategies, hedge funds use “leverage.” Leverage magnifies the rate of return of an investment, so that when profits are made, higher returns result. However, when there are losses, leverage again magnifies the amount of those losses. For example, consider the purchase of a \$10 stock when you borrow 90% of the purchase price (\$9). If the stock increases in price by \$1, then you have made a 100% profit on your \$1 up-front investment, even though the stock price itself has only changed 10%. However, if the price falls by \$1, you have lost your entire investment, even though the stock price has fallen by only 10%. This is the nature of leverage.

In addition to these strategies, hedge funds have been a significant player in the market for collateralized debt obligations (CDOs).²⁰ CDOs are a form of a derivative: a CDO is issued by a special purpose vehicle (SPV) – a separate corporate entity – where the SPV owns a portfolio of credit instruments such as mortgages as collateral. The payout to the holder of the CDO depends on its “tranche:”²¹ some are more senior and bear lower risk and lower return, while others are more junior and bear more risk. CDOs have come under intense scrutiny during this financial crisis. The criticism lodged against CDOs is that their complexity – involving hundreds of different financial instruments – made them difficult to properly assess value and risk, and also that by seeming to pool assorted risks, they gave the false impression that these risks did not need to be scrutinized more carefully. It was thought that by combining a number of different financial instruments, the overall risk would be re-

¹⁹ JOSEPH G. NICHOLAS, HEDGE FUND OF FUNDS INVESTING 43 (2004).

²⁰ For more on CDOs, see FRANK PARTNOY, INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS (2003), at 385-92. [hereinafter, INFECTIOUS GREED].

²¹ The term *tranche*, French for “slice,” refers to a portion of a pooled debt obligation that is different from other portions according to maturity date, risk level, and other factors.

duced. However, as the nation-wide decline in the housing market led to increased defaults on mortgages, CDOs that were supposed to have very low risks instead were discovered to have assets whose risks were strongly correlated. As a result, these instruments turned out to be much more risky than they initially appeared and were a primary cause of the fall of Bear Stearns, causing the collapse of two of its internal hedge funds in the summer of 2007.²²

II. ARE HEDGE FUNDS BENEFICIAL?

While hedge funds have received a great deal of criticism recently, less has been said about their social benefits. As we consider what to do about hedge funds, it is helpful to consider some of these benefits. As noted above, hedge funds seek risky investment opportunities, frequently using and sometimes developing instruments that are unavailable for many other financial sectors. In doing so, hedge funds play critical roles as arbitrageurs and in reallocating risk.

For example, consider the hedge fund strategy of convertible arbitrage, in which a hedge fund attempts to take advantage of relative pricing differences between convertible securities and the underlying common stock. A company offering both common stock and a convertible security does so to increase its flexibility in obtaining financing. However, the market for this financing is not always efficient: due to a variety of reasons,²³ the price available on the market for the convertible security may not reflect the full value of the underlying common stock. Hedge funds that take advantage of this inefficiency directly add to the market for the convertible security. Consequently, by pursuing this strategy, a hedge fund increases the demand for the convertible security, thereby enabling the company to obtain a larger amount of financing by issuing its convertible security. Thus, hedge funds reduce inefficiency by participating in arbitrage.

²² Kate Kelly and Randall Smith, *Market Swoons As Bear Stearns Bolsters Finances*, WALL ST. J., Aug. 4, 2007, at A1.

²³ One reason is future risk.

Hedge funds also enable the reallocation of risk by their development and use of alternative financial instruments. For example, Frank Partnoy in *Infectious Greed* tells the story of how Bankers Trust developed an "ingenious" technique to allow Japanese insurance companies to invest in Japanese stocks.²⁴ Under Japanese regulatory rules, Japanese insurance companies were forbidden to invest in Japanese stocks, but they were allowed to loan money. Bankers Trust designed a triangular trade in which Canadian investors borrowed Japanese yen and, instead of paying interest as the price for the loan, paid an "option on the Nikkei 225 stock index."²⁵ An identical option on the Nikkei 225 was then bought from European investors, through Bankers Trust (who was also providing a hedge for the Canadian investors). In the end, "[e]ffectively, a Nikkei 225 gamble was being passed from European investors to Bankers Trust to Canadian banks to Japanese insurance companies."²⁶ Although in this instance, these Japanese insurance companies ended up losing substantial sums in the crash of the Nikkei index,²⁷ the ability to develop new techniques to reallocate risks can deliver significant benefits to businesses.²⁸

Therefore, as we consider mechanisms to address the social costs of hedge funds, we should also remember the significant social benefits of hedge funds from arbitrage and reallocation of risk.

III. THE HISTORY OF HEDGE FUNDS AND PRIOR ANALYSIS ON THE REGULATION OF HEDGE FUNDS

The first hedge fund was founded by Alfred Winslow Jones in 1949.²⁹ It was extremely successful: "that hedge fund made gains of over 1000 percent in a ten-year period."³⁰ Organized to

²⁴ *INFECTIOUS GREED*, *supra* note 20, at 40-41.

²⁵ *Id.* at 40.

²⁶ *Id.* at 41.

²⁷ *Id.*

²⁸ A similar example is offered about the development of an alternative security to get around prohibitions against investment by U.S. investors in Thailand. *See id.* at 69-70.

²⁹ MARKHAM & HAZEN, *supra* note 13, at 885.

³⁰ *Id.*

avoid registration requirements, Jones's company was relatively unknown until a 1966 article in *Fortune* by Carol Loomis, "The Jones Nobody Keeps Up With."³¹ In this article, Loomis coined the term "hedge fund." This article "spurred others to mimic his success."³²

Other funds were then organized to avoid registration requirements under the Investment Company and Investment Advisers Acts. Hedge funds avoid regulation under the Investment Company Act of 1940 by utilizing two exemptions within the act. One exemption is for those funds that are "beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities."³³ Another exemption is based on limiting investors to "qualified purchasers" and "qualified clients."³⁴ Qualified purchasers have investments valued at \$5 million or more, while qualified clients have net worth of at least \$1.5 million or have \$750,000 invested in that fund.³⁵ Meanwhile, hedge fund advisers can also escape the registration requirements of the Investment Advisers Act of 1940 by having "fewer than fifteen clients" and not presenting themselves "generally to the public as an investment adviser nor acts as" one for an investment company.³⁶

To a great extent, hedge funds enjoyed significant successes until 1997 and 1998. In 1997, a number of Asian countries (in particular Thailand, Indonesia, and South Korea) underwent a financial crisis, causing collapse of Asian currencies and rapid declines in their stock market values. This crisis spread to Russia in 1998, leading to the collapse of Russian stock and bond markets, and the eventual decision by the Russian government

³¹ Carol Loomis, *The Jones Nobody Keeps Up With*, FORTUNE, Apr. 1966, at 237.

³² MARKHAM & HAZEN, *supra* note 13, at 885.

³³ 15 U.S.C. §80a-3(c)(1).

³⁴ Sean M. Donahue, Note, *Hedge Fund Regulation: The Amended Investment Advisers Act Does Not Protect Investors from the Problems Created by Hedge Funds*, 55 CLEV. ST. L. REV. 235, 238 (2007).

³⁵ *Id.*

³⁶ 15 U.S.C. § 80b-3(b)(3) (2006).

to devalue the ruble and declare a moratorium on its bonds on August 17, 1998.³⁷

The volatility in financial markets caused by these crises led to significant losses by hedge funds. The most-publicized hedge fund to be harmed during these crises was the Long-Term Capital Management Fund (LTCM). LTCM had been founded in 1994 by John Meriwether, a former top trader at Salomon Brothers, and it included Nobel laureates Robert C. Merton and Myron Scholes as founding principals.³⁸ Despite its sterling reputation and extremely high returns in its initial years, the fund suffered tremendous losses of billions of dollars due to its highly leveraged positions in related securities.³⁹ Eventually, the Federal Reserve Bank of New York organized a rescue of the fund, with a consortium of creditors and banks injecting capital in exchange for ninety percent of the equity in LTCM. It should be noted that less than a year later, after the crisis had abated, the value of LTCM's positions improved significantly, leading to a profit for the consortium members.⁴⁰

In the aftermath of LTCM, the President's Working Group on Financial Markets (PWG) issued a report on hedge funds in 1999.⁴¹ The PWG had been established after the 1987 stock market crash, and it consists of the Secretary of the Treasury, the Chairmen of the Federal Reserve, Securities and Exchange Commission, and the Commodities Future Trading Commission. The PWG recommended increasing disclosures about transactions by and with "significantly leveraged institutions, including hedge funds."⁴² However, this report did not recommend requiring the registration of hedge funds.

³⁷ See Abigail J. Chiodo and Michael T. Owyang, *A Case Study of a Currency Crisis: The Russian Default of 1998*, 84 FED. RESERVE BANK OF ST. LOUIS REV. 7 (2002), available at <http://research.stlouisfed.org/publications/review/02/11/ChiodoOwyang.pdf>.

³⁸ See *Long Term Capital Holdings v. United States of America* (D. Conn. Aug. 27, 2004), at 5, available at <http://www.usdoj.gov/tax/082704JBALongTermUS.pdf>.

³⁹ See *Lakonia Management Ltd. v. Meriwether*, 106 F. Supp. 2d 540, 547 (S.D.N.Y. 2000); and ROGER LOWENSTEIN, *WHEN GENIUS FAILED: THE RISE AND FALL OF LONG-TERM CAPITAL MANAGEMENT* (2000).

⁴⁰ *Lakonia Management Ltd.*, 106 F. Supp. 2d at 548-49.

⁴¹ PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, *HEDGE FUNDS, LEVERAGE, AND THE LESSONS OF LONG-TERM CAPITAL MANAGEMENT* (1999), available at <http://www.treas.gov/press/releases/reports/hedgfund.pdf>.

⁴² *Id.* at viii.

Nonetheless, in 2004, the Securities and Exchange Commission (SEC) promulgated a rule that essentially required hedge funds to register as investment advisers.⁴³ This decision was adopted by “a rare 3-2 margin, with an extensive dissent.”⁴⁴ A number of lawsuits were filed to challenge the implementation of this rule. In one of these suits, *Goldstein v. S.E.C.*, the D.C. Circuit Court of Appeals vacated this rule, holding that its reclassification of “client” to include any “investor” was “arbitrary,” and therefore not reasonable.⁴⁵

Until the current financial crisis, the literature on the regulation of hedge funds was focused on the two events of the collapse of LTCM, and the SEC’s registration rule along with its undoing in *Goldstein*. In the aftermath of LTCM, Willa Gibson recommends a limited amount of command-and-control regulation of hedge funds.⁴⁶ What is needed is “public regulation requiring hedge funds to disclose comprehensive information about their trading positions to financial regulators.”⁴⁷ Despite this, Gibson also concludes that command-and-control rules restricting leverage by hedge funds, such as “capital and margin requirements,”⁴⁸ would be “inefficient and unnecessary.”⁴⁹ Instead she suggests, “[p]rivate regulation achieved through the exercise of market discipline, both by hedge funds and by those with whom they trade, can provide a more effective means of constraining the use of leverage.”⁵⁰

In two reports,⁵¹ Randall Dodd first identifies “specific features about financial markets . . . that violate the fundamental

⁴³ *Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Release No. IA-2333, 84 SEC Docket 1032* (Dec. 2, 2004). For more on this decision, see Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC’s Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975 (2006) (recommending the use of a “default rule” rather than a “mandatory rule” for decisions like this).

⁴⁴ J.W. Verret, *Dr. Jones and the Raiders of Lost Capital: Hedge Fund Regulation, Part II, a Self-Regulation Proposal*, 32 DEL. J. CORP. L. 799, 808 (2007).

⁴⁵ *Goldstein v. SEC*, 451 F.3d 873, 884 (D.C. Cir. 2006).

⁴⁶ Willa E. Gibson, *Is Hedge Fund Regulation Necessary?* 73 TEMP. L. REV. 681 (2000).

⁴⁷ *Id.* at 682.

⁴⁸ *Id.* at 706.

⁴⁹ *Id.*

⁵⁰ *Id.* at 706.

⁵¹ Randall Dodd, *The Economic Rationale for Financial Market Regulation*, FINANCIAL POLICY FORUM SPECIAL POLICY REPORT 12 (2002), available at

assumptions . . . of the efficient market theory."⁵² These features include externalities, public goods, and informational problems. Because of these, "financial markets and the overall economy can be made more efficient by the imposition of certain government regulations."⁵³ Dodd argues in the second report that a number of new regulations should be imposed, including "reporting and registration requirements," "capital requirements and collateral requirements," and "Orderly Market Rules."⁵⁴

After the *Goldstein* case, a number of articles appeared suggesting that public regulation of hedge funds, even of the limited type recommended by Gibson, would be the incorrect approach. Although advocating some additional indirect controls on the amount of leverage available to hedge funds, Dale Oesterle argues that "extensive direct regulation of hedge funds is unnecessary and may harm the country's trading markets."⁵⁵ Carl J. Nelson likewise "argues that further hedge fund regulation is unnecessary and could actually negatively affect markets."⁵⁶ As a result, "increased hedge fund regulation should not be implemented because the potential benefits do not outweigh the costs."⁵⁷ Instead, Nelson offers alternatives that "address regulators' concerns over providing investor protection and market stability, while allowing hedge funds to operate freely."⁵⁸ In a similar manner, J.W. Verret concludes, "caught up in the regulatory zeal, the SEC and banking regulators will burden the nimble traders of the hedge fund world with regulation akin to the mutual fund industry and seek to limit access for institutional investors like trusts and pension funds to this useful as-

<http://www.financialpolicy.org/fpfspr12.pdf>; and Randall Dodd, *The Virtues of Prudential Regulation in Financial Markets*, FINANCIAL POLICY FORUM SPECIAL POLICY REPORT 11 (2005), available at <http://www.financialpolicy.org/fpfspr11.pdf>.

⁵² Dodd, *Economic Rationale*, *supra* note 51 at 1, 3.

⁵³ *Id.* at 3.

⁵⁴ Dodd, *Virtues of Prudential Regulation*, *supra* note 51 at 1-2.

⁵⁵ Dale A. Oesterle, *Regulating Hedge Funds*, 1 ENTREPREN. BUS. L.J. 1, 2 (2006).

⁵⁶ Carl J. Nelson, Note, *Hedge Fund Regulation: A Proposal to Maintain Hedge Funds' Effectiveness Without SEC Regulation*, 2 BROOK. J. CORP. FIN. & COM. L. 221, 222 (2007).

⁵⁷ *Id.*

⁵⁸ *Id.*

set class.”⁵⁹ Verret instead recommends a private regulatory scheme by the hedge funds themselves.

Until the current financial crisis, policymakers were likewise hesitant to regulate hedge funds. During his nomination hearings in 2004, Alan Greenspan proclaimed, “I see no purpose in regulation [of hedge funds], and I see very significant potential loss in doing so.”⁶⁰ He explained: “[i]f you start to inhibit the number of types of unregulated participants in the financial market from taking the types of risks and supplying the liquidity, I am fearful that we will remove some of the flexibility that we have in our overall system.”⁶¹

As recently as February 2007, the President’s Working Group on Financial Markets echoed Gibson in preferring market discipline over command-and-control regulation. In 2007, the PWG examined the need for regulation of hedge funds and concluded, “[m]arket discipline by creditors, counterparties, and investors is the most effective mechanism for limiting systemic risk from private pools of capital.”⁶²

Nonetheless, the current financial crisis has now led academics and policymakers to recommend additional regulation of hedge funds. In a recent article addressing systemic risk across the financial system, Steven Schwarcz concludes that “regulatory measures are appropriate . . . because, like a tragedy of the commons, market participants have insufficient incentives, absent regulation, to limit risk-taking in order to reduce the systemic danger to others.”⁶³ Included in his recommendations is a “liquidity provider of last resort” (LPOLR),⁶⁴ which is somewhat similar to the part of this article’s Superfund, the part that purchases “toxic” securities.⁶⁵ However, the scope of Schwarcz’s

⁵⁹ Verret, *supra* note 44, at 841.

⁶⁰ Nomination of Alan Greenspan, Hearing Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, One Hundred Eighth Congress (2004), available at <http://www.access.gpo.gov/congress/senate/senate05sh108.html>.

⁶¹ *Id.*

⁶² PRESIDENT’S WORKING GROUP ON FINANCIAL MARKETS, AGREEMENT AMONG PWG AND U.S. AGENCY PRINCIPALS ON PRINCIPLES AND GUIDELINES REGARDING PRIVATE POOLS OF CAPITAL (2007), at 3, available at http://www.treasury.gov/press/releases/reports/hp272_principles.pdf.

⁶³ Schwarcz, *supra* note 8, at 248.

⁶⁴ *Id.* at 225.

⁶⁵ See *infra*, Part VI.C.

LPOLR would be much broader than this article's Superfund. The LPOLR would address systemic risk across all financial sectors, while the Superfund would address the market failures of liquidity risk and valuation caused solely by hedge funds.

In 2008, the United States Treasury published its "Blueprint for a Modernized Financial Regulatory Structure."⁶⁶ In its Blueprint, the Treasury recommended a new structure for the regulation of all financial institutions. Included in this structure would be the requirement for all financial institutions to be federally chartered, with hedge funds required to obtain a charter as a federal financial services provider (FFSP). To obtain this charter, hedge funds would be required to meet "appropriate national standards, in terms of financial capacity, expertise, and other requirements. . . . For example, these standards would resemble the net capital requirements for broker-dealers."⁶⁷ Also, the Blueprint assigned the role of "Market Stability Regulator" to the Federal Reserve. In this role, "the Federal Reserve should also have the authority to develop information-reporting requirements for FFSPs . . . includ[ing] detailed reports on overall risk management practices."⁶⁸

Around the same time as the Treasury Blueprint, another proposal was made by the Financial Stability Forum (FSF).⁶⁹ This proposal was in response to a request by the "G7 Ministers and Central Bank Governors . . . to undertake an analysis of the causes and weaknesses that have produced the turmoil and to set out recommendations for increasing the resilience of markets and institutions."⁷⁰ In its proposal, the FSF made a number of recommendations that involved regulation of hedge funds and

⁶⁶ U.S. DEPARTMENT OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE (2008), available at [http://www.ustreas.gov/press/releases/reports/Blue print.pdf](http://www.ustreas.gov/press/releases/reports/Blue%20print.pdf).

⁶⁷ *Id.* at 19.

⁶⁸ *Id.* at 16. A similar recommendation of apportioning oversight roles based on objectives is derived from an analysis of the social and network effects of investment trading. See Olufunmilayo Arewa, *Trading Places: Securities Regulation, Market Crisis, and Network Risk* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324951.

⁶⁹ FINANCIAL STABILITY FORUM, REPORT OF THE FINANCIAL STABILITY FORUM ON ENHANCING MARKET AND INSTITUTIONAL RESILIENCE (2008), available at [http://www.fsforum.org/publications/ r_0804.pdf](http://www.fsforum.org/publications/r_0804.pdf).

⁷⁰ *Id.* at 1.

other financial institutions. One recommendation involved the imposition of “requirements for certain complex structured credit products such as CDOs of asset-based securities.”⁷¹ Others involved the use of rules for the “management of firm-wide risks” including “stress testing guidance for risk management and capital planning purposes,”⁷² and rules for “enhancing transparency and valuation.”⁷³

Recently, the United States Congress has also explored the possibility of regulating hedge funds. In one hearing, a House of Representatives committee heard the testimony of five prominent hedge fund managers: Philip A. Falcone, Kenneth C. Griffin, John A. Paulson, James Simons, and George Soros. These leaders “said they would support new rules that would require their industry, controlling nearly \$2 trillion, to disclose more of its secrets. . . . [T]he hedge fund industry’s leaders seem to realize that regulation may be inevitable.”⁷⁴ In January 2009, Senators Carl Levin and Charles Grassley introduced the Hedge Fund Transparency Act to “impose government oversight of hedge funds.”⁷⁵ Under this bill, hedge funds would be required to register with the SEC, and would also require disclosure of assets.⁷⁶ This legislation was preceded by the issuance of a report advocating more intensive regulation of hedge funds by the Group of Thirty, headed by Paul Volcker, former Chairman of the Federal Reserve and current advisor to the Obama administration.⁷⁷ Moreover, in February 2009, state legislators in Connecticut likewise introduced three pieces of legislation to enable state regulation of hedge funds.⁷⁸

⁷¹ *Id.* at 13.

⁷² *Id.* at 18.

⁷³ *Id.* at 22.

⁷⁴ Louise Story, *Hedge Fund Managers Ask for a Few New Rules*, N.Y. TIMES, Nov. 14, 2008, at B6.

⁷⁵ Stephen Labaton, *Senators Bid To Regulate Hedge Funds*, N.Y. TIMES, Jan. 30, 2009 at B1. This bill also covers private equity firms.

⁷⁶ Jenny Strasburg, *Legislators Seek Hedge-Fund Disclosure*, WALL ST. J., Feb. 2, 2009, at C2.

⁷⁷ GROUP OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY (2009), available at http://www.group30.org/pubs/pub_1460.htm.

⁷⁸ Greg Bordonaro, *Lawmakers Propose Stiff Hedge Fund Oversight*, HARTFORD BUS. J., Feb. 23, 2009, available at <http://www.hartfordbusiness.com/news8031.html>.

Meanwhile, there have been many proposals to put a tax on financial services transactions. In 1978, James Tobin proposed a one percent tax on currency transactions in the spot market, in order to reduce short-term currency speculation.⁷⁹ In 1989, Joseph Stiglitz proposed a 0.25% tax on all financial services transactions, likewise to reduce short-term speculation.⁸⁰ Recently, Dean Baker has advocated a tax on all financial transactions that varies according to the type of transaction.⁸¹

My research then is an attempt to present an alternative structure to dealing with the problems presented by hedge funds, rather than imposing restrictive command-and-control regulation. My article proposes using a tax on hedge funds, but it differs significantly from these previous recommendations to tax financial transactions.

One difference is its more limited scope: it would apply only to hedge funds and not to other financial institutions that operate under more extensive command-and-control regulation such as mutual funds and investment banks. More importantly, these other tax proposals levy either a flat tax for all financial transactions or a tax that is differentiated only by type of security (equity, bond, future, option, interest rate swap). In contrast, under my proposal, the level of the tax is adjusted depending on the effect of the hedge fund's transaction on liquidity risk. While flat taxes reduce the activity level of these transactions, only calibrated taxes provide direct disincentives to reduce specifically risky transactions.

IV. THE SOCIAL COSTS OF HEDGE FUNDS

While hedge funds do provide many social benefits, they also can bring significant social costs. Two of the most significant

⁷⁹ James Tobin, *A Proposal for International Monetary Reform*, 4 E. ECON. J. 153 (1978), cited in Robert Polin, Dean Baker & Mark Schaberg, *Securities Transaction Taxes for U.S. Financial Market*, 20 POL. ECON. RES. INST. WORKING PAPER SERIES 2 (rev. 2002).

⁸⁰ Joseph E. Stiglitz, *Using Tax Policy to Curb Speculative Short-Term Trading*, 3 J. FIN. SERVICES RES. 101 (1989).

⁸¹ See Dean Baker, *The Benefits of a Financial Transactions Tax* (2008), available at <http://www.cepr.net/documents/publications/financial-transactions-tax-2008-12.pdf>. Baker's proposal is a fee structure that applies not only to equity trades, but also to bonds, futures, options, and interest rate swaps.

are liquidity risks, which can be considered as an externality, and the inability of markets to provide information on valuation.

A. Liquidity Risks

We begin with a discussion about liquidity in general, followed by an analysis of hedge funds effects on liquidity. Liquidity is the ability to convert certain assets into other assets without suffering any loss in value. Universally accepted money—"cash"—is the most liquid asset, because it can be used to acquire other assets without losses in value. Some might think that liquidity (money) does not affect the real economy because the real economy results from real inputs (labor, capital, land, technology) generating real outputs (goods and services). However, liquidity does have significant effects on the real economy.

This can be understood by considering the indirect production function. The direct production function states that output (Y) is generated by combining inputs (X), a vector of different inputs) according to the functional relationship, $Y = F(X)$. However, in an economy, the production function operates under the following constraint: you must be able to afford your inputs. Therefore, the full direct production function is actually:

$$Y = F(X), \text{ subject to } C = WX \text{ (where } C \text{ is your available cash, and } W \text{ represents the vector of input prices).}$$

We can rearrange this to solve for the indirect production function:

$$Y = \Psi(W, C).$$

This indirect production function makes it clear that liquidity (C , cash) has a direct effect on the ability of the economy to generate real output (Y).

This effect seen through the indirect utility function can also be understood intuitively. In business operations, input costs are generally incurred prior to the generation of revenues. As a result, in order to operate production, the firm must obtain short-term financing to pay for inputs prior to the realization of the revenues. Consequently, when credit is tight (i.e. there is a

reduction in liquidity), it is difficult to finance operations and less output is generated.

Because liquidity has effects on the real economy, reductions in liquidity can have detrimental effects. Indeed, reductions in liquidity – liquidity risks – can be considered as an externality, just like pollution.⁸² An externality is generated when the actions of two trading partners have consequences for a third party. A factory may be building a table for purchase by a consumer who lives in another state. However, in constructing the table, the factory also generates pollution that causes negative consequences for neighboring residents. These negative consequences are known as a negative externality, because these residents are not part of the transaction between the factory and the consumer. These externalities are an example of a market failure.⁸³

We use a variety of mechanisms for correcting the market failure resulting from pollution: command-and-control regulation, along with economic-incentive-based instruments such as tradable permit systems⁸⁴ and tax systems.⁸⁵ Under command-and-control regulation, a government agency prescribes pollution abatement standards for a particular industry that must be complied with by each firm in order to obtain its permit. These requirements may be stated in technological terms, i.e., each firm must use specific pollution reduction equipment. They may also be stated in terms of a maximum quantity of pollution emitted. However, to determine this maximum quantity, the agency bases this quantity on the amount emitted when specific

⁸² Just as with liquidity, models of the production function sometimes include pollution as an input. See Maureen L. Cropper & Wallace E. Oates, *Environmental Economics: A Survey*, 30 J. ECON. LIT. 675 (1992); Don Fullerton & Gilbert E. Metcalf, *Environmental Controls, Scarcity Rents, and Pre-Existing Distortions*, 80 J. PUB. ECON. 249 (2001).

⁸³ Economists generally identify the principal market failures as externalities, public goods, moral hazard, imperfect information, and firms with market power such as monopolies. See CASE & FAIR, *supra* note 9, at 255-59, 335.

⁸⁴ One such example of a pollution trading system is the RECLAIM emissions market for southern California. See Dale B. Thompson, *Political Obstacles to the Implementation of Emissions Markets: Lessons from RECLAIM*, 40 NAT. RESOURCES J. 645 (2000).

⁸⁵ The use of a tax for correcting market failures was first suggested by ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

pollution reduction equipment is used.⁸⁶ So, in essence, all command-and-control regulatory systems for pollution reduction are based on rules specifying the use of particular pollution-reduction technology.

Economic-incentive-based instruments are designed to address the overproduction of the good that generates the pollution. Because of the existence of the externality, the firm producing the good does not internalize the full social costs of the good. In Figure 1, this effect is seen by having the marginal-private-cost curve (*MPC*) lie below the marginal-social-cost curve (*MSC*). The difference between the two curves is the social cost of the externality. Because the *MPC* curve can be understood as the supply curve (in a competitive industry) and the marginal-benefit curve (*MB*) can be understood as the demand curve, equilibrium quantity⁸⁷ (*Q2*) is higher than the socially optimal quantity⁸⁸ (*Q1*). Under a tradable permit system, the quantity of available permits is limited to restrict production to no more than the socially optimal quantity. In a tax system, a Pigouvian tax is imposed to internalize the social costs of that pollution. The amount of the tax is equal to the social cost of the externality (*t*). A firm paying the Pigouvian tax will have its *MPC* shifted up by the amount of the tax. As a result, the new *MPC* curve is now identical to the *MSC* curve, and the equilibrium quantity will now be the socially optimal quantity.

In a similar way to pollution, transactions that reduce liquidity generate externalities. When liquidity is reduced, the productive capacity of other firms may be reduced. These external effects are a market failure, because the firms engaged in the transaction that reduces liquidity do not consider the effects on other firms. Just as with pollution, we may need governmental intervention to address the externality of liquidity risks.

To better determine how we should address liquidity risks caused by hedge funds, we now examine how hedge funds affect liquidity. A comparison with bank runs, such as those that oc-

⁸⁶ See Dale B. Thompson, *Beyond Benefit Cost Analysis: Institutional Transaction Costs and the Regulation of Water Quality*, 39 NAT. RESOURCES J. 517 (1999).

⁸⁷ Equilibrium quantity occurs where supply equals demand, i.e. where *MPC* = *MB*.

⁸⁸ The socially optimal quantity occurs where the full marginal social cost is equal to the full marginal social benefit.

curred during the Great Depression,⁸⁹ will aid this analysis. In a bank run, a cycle is created by a lack of confidence in banks. It starts with some loss of confidence in a bank. Then, because of this lack of confidence, depositors feel the need to withdraw funds from the bank. However, due to reserve requirements,⁹⁰ the bank must now acquire more cash in some way. It may have to sell some of its loans, which are its current assets, to raise the cash. In doing so, the bank will “deleverage” its loans. However, this deleveraging erodes the values of the loans, which means that the balance sheet of the bank is worse than before. As a result, depositors will lose confidence in the bank even further and withdraw more funds. This withdrawal of funds reduces the amount of loans that the banks are able to make, thereby directly reducing liquidity. And the cycle continues over and over.

The negative impacts of reduced liquidity resulting from bank runs were a significant factor behind the Great Depression. During the Depression, the government established the Federal Deposit Insurance Corporation (FDIC) to address bank runs. The FDIC provided limited deposit insurance on bank deposits.⁹¹ Although it was limited to a certain amount, this insurance greatly reduced the possibility of a bank run, thereby reducing liquidity risks.⁹²

A similar cycle occurs for hedge funds. The cycle starts when there is an external event that causes a drop in the value

⁸⁹ Note, however, that there is less need to protect institutional investors in hedge funds than depositors of affected banks because institutional investors are better able to assess the risk of the fund.

⁹⁰ Under a reserve requirement, banks must hold a certain percentage of their loans as “reserves,” i.e., cash or reserves with the central bank. When deposits of cash reserves flow out, a bank that previously met its reserve requirement no longer has sufficient reserves to cover their percentage of loans.

⁹¹ Under the Glass-Steagall Deposit Insurance Act of 1933 (Banking Act of 1933), 48 Stat. 162, deposits were insured up to \$2500. This amount has been raised many times, and currently stands at \$250,000.

⁹² The FDIC model is another one that might be considered in constructing the Superfund for hedge funds. The FDIC is a long-term solution not a temporary one, and is funded by risk-adjusted insurance premiums collected from banks. Also, it acquires “toxic assets” from banks upon their failure, such as what occurred during the Continental Illinois National Bank failure. See “Continental Illinois and ‘Too Big to Fail,’” in *FEDERAL DEPOSIT INSURANCE CORPORATION, 1 AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S*, at 235-58 (1997), available at http://www.fdic.gov/bank/historical/history/235_258.pdf.

of certain assets held by the hedge fund. Under “mark-to-market” accounting principles, this drop in the market value of the fund’s assets must be recorded on the fund’s balance sheet. The deterioration of the fund’s balance sheet has two significant effects: short-term debt financing is more difficult, and the fund may be forced to take actions under covenants in long-term debt instruments.

The fund will hold a portfolio of both long and short-term assets. The effect of the deterioration in the balance sheet is increased pressure to shift the portfolio away from long-term assets and towards short-term assets.⁹³ However, just as with banks, this deleveraging of long-term assets erodes their value.

If this is only happening to one fund, then this reduction in value may be negligible. However, the problem is exacerbated by a number of factors present in the operation of hedge funds. As noted above, hedge funds use significant amounts of leverage. This leverage magnifies the effects of losses. Also, hedge funds often are the “counterparties” of other funds in the market for derivatives.⁹⁴ Consequently, a complex web of relationships results when the balance sheet for one fund is harmed: that fund’s counterparties now face increased “counterparty risk,” i.e., the risk that the initial fund will default. This counterparty risk in turn means that the reduction in value will spread to other funds causing them in turn to shift their portfolio from long-term to short-term assets.

All of this activity by the funds means that they are making increased demands on the relatively fixed supply of short-run financing. Consequently, the result is to divert cash away from other activities into the funds. This diversion reduces liquidity, the scale of which is amplified by leverage and counterparty risk. Thus, the actions of hedge funds can lead to increased liquidity risks.

⁹³ Note however that “lock-in” provisions of hedge funds, which prohibit withdrawals except at designated times, increase funds’ flexibility in managing their mix of short and long-term loans.

⁹⁴ A “counterparty” is the other party in a derivative contract.

B. Valuation Problems

A closely related market failure for hedge funds is the reduction of the ability of market prices to provide relevant information about valuation. This effect has not previously been noted as a market failure because market failures have been thought to arise when something prevents an efficient trade. However, this view is limiting: it implicitly assumes that the predominant role of a market is to enable transactions. Additionally, markets provide information about valuation through market prices. This information helps consumers make choices and also helps businesses as they make decisions about future investment possibilities. When market prices no longer provide adequate information about valuation, markets are failing to fulfill their full roles for consumers and businesses. Consequently, recognizing this effect as a market failure is a significant contribution of this article. We will first examine how market prices provide valuation information in general and then discuss how the market failure may arise. After that, we will analyze how hedge funds actions may lead to this market failure.

Two of the most important lessons from an introductory course in economics are that the market equilibrium occurs where supply equals demand and that economic decision-makers (consumers, producers) maximize their behavior by setting marginal benefit equal to marginal cost. These two lessons are actually closely related.

In a competitive market, the market supply curve can be understood as the marginal cost curve of the producers making the product, and the market demand curve likewise as the marginal benefit curve of consumers. Consider a simple competitive market involving one firm and one consumer.⁹⁵ Let us assume that the firm's marginal cost curve (MC) grows exactly as quantity (Q) increases: $MC=Q$. Also, assume that the consumer's marginal benefit (MB) declines as quantity increases: $MB=2-Q$. In a perfectly competitive market, the firm will determine the quantity it produces by setting the market price equal to its

⁹⁵ Generally, a competitive market implies we have many firms, but for clarity, we will consider the case with only one here.

marginal cost. Similarly, the consumer will determine the quantity it purchases by setting the market price equal to its marginal benefit. In this example, we find the market equilibrium will occur where price and quantity both equal 1.⁹⁶

What we see from this example is one of the significant benefits of markets: the ability of market prices to reflect the valuation of the good, at the margin. The producer sets the market price equal to its marginal cost, and this marginal cost reflects the marginal value of the good to the producer. Likewise, the consumer sets the market price equal to its marginal benefit, and this marginal benefit reflects the marginal value of the good to the consumer. Thus, market prices provide significant information about the marginal valuation of the good for both producers and consumers: these market prices are Adam Smith's "invisible hand."

However, market prices do not provide all of the information we need to know about valuation. For example, consider a corporate acquisition of Alpha Corporation by the Beta Corporation. Under corporate law, this acquisition would have to be approved by the shareholders of the Alpha Corporation, although this approval need not be unanimous. Assume Alpha's share price is currently trading for \$20 per share. Beta proposes a tender offer of \$25 per share for all of Alpha's shares. This represents a 25% premium over the current market price. Although this offer might seem to be "fair" based on the market price, nonetheless corporate law provides an alternative for shareholders of Alpha who wish to dissent from the acquisition: the right to an appraisal of the "fair value" of their shares.⁹⁷

The reason why we need appraisal rights has to do with the range of valuation of different shareholders of the same company, as suggested by the literature known as "heterogeneous expectations."⁹⁸ Consider the following supply and demand dia-

⁹⁶ See Figure 2.

⁹⁷ The appraisal right is the right to a "pro rata" share of a court-determined valuation of the entire corporation. See DEL. CODE ANN. tit. I, § 262 (2010).

⁹⁸ For more on "heterogeneous expectations," see Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235 (1990).

grams for Alpha Corporation stock.⁹⁹ The demand curve for Alpha Corporation stock represents a set of valuations of Alpha by investors who might purchase the stock: as you reduce price from $\$P1$ to $\$P2$, the additional quantity demanded ($Q2 - Q1$) means that there are $(Q2 - Q1)$ investors¹⁰⁰ whose valuation of Alpha is between $\$P1$ and $\$P2$. In case I, there is not a wide variance in valuation by the different consumers. However, in case II, there is a wide variation: there are some who value Alpha Corporation stock significantly higher than the current market price of $\$20$. In case I, a $\$25$ per share tender offer would be "fair" to every shareholder because it would be greater than or equal to the implied valuation of every shareholder. However, in case II, there are a number of shareholders whose implicit valuation of Alpha exceeds $\$25$. Appraisal rights would then be necessary to protect these shareholders, who otherwise might be outvoted.

Thus, in this instance, although it does reflect the valuation of marginal shareholders, the market price does not sufficiently capture information about the valuation of Alpha by non-marginal shareholders. Thus, while market prices give good information about valuation at the margin, this no longer applies when we are not at the margin. In this case, this market failure is corrected by the corporate law instrument of appraisal rights.

Due to the nature of their operations, hedge funds can also create situations where we are no longer operating at the margin for some security, and hence market prices will no longer provide sufficient information about valuation. One situation arises due to leverage and the use of derivative instruments. Assume that a fund has determined that there seems to be a pricing discrepancy between a derivative and an underlying security. The fund then decides to use leverage to purchase a large quantity of derivatives. Sometimes these purchases are so large that the quantity of derivatives represents essentially the full

⁹⁹ See Figures 3 and 4.

¹⁰⁰ For clarity, we assume that each investor can purchase only one share of stock.

quantity of the underlying security¹⁰¹ that is reasonably available in the market.

Although not done by a hedge fund, the recent episode of the “short squeeze” that Porsche performed on Volkswagen stock illustrates this well. Since 1960, ownership interests in Volkswagen had been effectively limited by the “Volkswagen law” that prevented any individual shareholder from exercising more than twenty percent of the voting rights in the company.¹⁰² Starting in 2005, Porsche had begun accumulating Volkswagen stock but had been stymied in its efforts to assert greater control over Volkswagen.¹⁰³ However, in 2007, the European Union’s highest court, the Court of Justice, ruled that this law was a “breach of the free movement of capital.”¹⁰⁴ After this ruling, Porsche could now begin accumulating a larger ownership interest in Volkswagen.

It did this through the mechanism of “cash-settled options,” in which “the buyer [of the option] gets the right not to stock but the cash difference between the options’ ‘strike price’ and the market price of the shares when the options are exercised.”¹⁰⁵ Sellers of these options “typically hedge their exposure by holding actual shares. That takes these shares out of circulation.”¹⁰⁶ In Germany, while ownership stakes needed to be disclosed if options could be redeemed in shares, no disclosure was required for ownership stakes due to cash-settled options.¹⁰⁷ Consequently, Porsche was able to quietly amass a large ownership stake in Volkswagen.

¹⁰¹ And sometimes even more than the full quantity, such as was done recently by Amherst Holdings, which sold credit default swaps for mortgages, and then purchased the underlying mortgages, rendering the swaps worthless. See Gregory Zuckerman, Serena Ng & Liz Rappaport, *A Daring Trade Has Wall Street Seething*, WALL ST. J., June 11, 2009, at C1.

¹⁰² Press Release, Court of Justice of the European Union, Judgment of the Court of Justice in Case C-112/05, *Commission of the European Communities v. Federal Republic of Germany* (Oct. 23, 2007), available at <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070074en.pdf> [hereinafter VW Law case].

¹⁰³ Mike Esterl & Edward Taylor, *As Giant Rivals Stall, Porsche Engineers a Financial Windfall*, WALL ST. J., Nov. 8, 2008, at A1.

¹⁰⁴ VW Law case, *supra* note 102, at 1.

¹⁰⁵ Esterl & Taylor, *supra* note 103.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

On October 26, 2008, Porsche announced that it directly owned 42.6% of Volkswagen's common stock and held cash-settled options on another 31.5% of the shares.¹⁰⁸ At that point, the state of Lower Saxony also held 20% of Volkswagen's stock. Meanwhile, approximately "12.8% of VW shares were on loan, mostly to short sellers."¹⁰⁹ Adding the numbers together, we see that "[t]here weren't enough [Volkswagen shares] to go around."¹¹⁰ The result was chaos:¹¹¹

When financial markets opened Monday Oct. 27, all hell broke loose. Funds that had borrowed VW shares and sold them, expecting no takeover offer and betting the stock would decline, raced to purchase shares to unwind the bets. . . . As hedge funds fought for the remaining VW shares, they drove the stock's price ever higher—deepening their losses. At the height of the short squeeze on Oct. 28, VW stock briefly topped €1,000, nearly five times as high as on Oct. 24, making VW the biggest company by stock-market value [in the world] for a few hours.¹¹²

In *Infectious Greed*, Frank Partnoy tells a similar story of how Paul Mozer at Salomon Brothers executed a "squeeze" of the market in newly issued U.S. Treasury notes.¹¹³ For this market, there was a "when issued" market for about-to-be-issued Treasury notes. The general trend was for the price to rise in the "when issued" market, followed by a drop in the price after the notes were issued. As a result, there were opportunities for arbitrage that many traders attempted to exploit, by shorting Treasury notes in the "when issued" market and then repurchasing those notes after issue. Mozer realized however that "if he could control the Treasury auction, he could *squeeze* the other dealers doing the arbitrage, . . . forcing them to pay a

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ This chaos would play a significant role in the suicide of "Adolf Merckle, the German billionaire whose speculation in volatile Volkswagen stock had pushed his sprawling business empire to the edge of ruin." Carter Dougherty, *Facing Losses, Billionaire Takes His Own Life*, N.Y. TIMES, Jan. 7, 2009, at B1.

¹¹² Esterl & Taylor, *supra* note 103.

¹¹³ INFECTIOUS GREED, *supra* note 20, at 97-102.

premium to buy the precious, recently auctioned bonds.”¹¹⁴ After being warned a number of times by a Treasury official, Mozer was still able to eventually purchase “86 percent of the May auction” of 1991.¹¹⁵ As a result of this position, “[t]he big squeeze was on. The price of the 2-year notes skyrocketed, and the holders of the notes made \$30 million.”¹¹⁶

What we see from these examples is that hedge funds (and other traders) can establish positions in a small market where they can exert significant market power due to their control over a large percentage of the available quantity of a specific financial instrument (Volkswagen stock in one case and a particular Treasury issue in another). When this happens, we are no longer at a marginal market equilibrium for that security where the market price reflects a trade between a buyer who wants to acquire a marginal quantity of the security and a seller who wants to sell a marginal amount of that same security, neither of which able to influence the price because their trading partner could easily find another willing seller or buyer.

Another situation where the price does not give information about valuation is closely related to liquidity risk. As noted above, in a liquidity crunch, hedge funds may create a situation in which they need to shift from long-term assets, such as financial derivatives, into short-term ones. This may lead to the result where a number of funds attempt to sell similar financial derivatives at a time where there are limited buyers.¹¹⁷ These limited buyers essentially will then have monopsonistic power.¹¹⁸ Similar to above, this then creates a situation where a true market equilibrium price cannot be established because we are no longer operating “at the margin.”

The result of these situations of operating away from the margin is that market prices no longer provide adequate information about value of these financial products. When there is a

¹¹⁴ *Id.* at 98.

¹¹⁵ *Id.* at 101.

¹¹⁶ *Id.* at 102.

¹¹⁷ See Hugo Dixon and Richard Beales, *Regulating 'Shadow Banks,'* N.Y. TIMES, Feb. 24, 2009, at B2 (noting that “because the shadow banks moved as a herd, they helped inflate the bubble and worsened the bust”).

¹¹⁸ A *monopsonist* is a single buyer in a market and asserts market power similar to a monopolist, who is a single seller in a market.

significant gap between a large group of possible sellers and a small group of potential buyers, we lose the relatively equal bargaining position between the seller and buyer. Instead, the buyer has market power and can use that market power to extract a low price. As a result, market prices in these transactions no longer reflect marginal valuations.

This market failure has additional consequences. Due to "mark-to-market" accounting principles, hedge funds must use market transaction prices to determine the "market value" of their portfolio. This market failure means that the market prices used for this will inadequately reflect the true value of the affected financial securities. As a result, their balance sheet will be negatively impacted, and hedge funds again will face pressures to shift from long-term assets to short-term ones. This effect then creates a feedback loop that continues the cycle, leading to deeper liquidity risk.

V. INSTRUMENTS TO ADDRESS MARKET FAILURES

We now turn to examine instruments to address the market failures of liquidity risk and valuation. Typically, we use government intervention to address market failures, however, private institutions can also be used to address market failures. Nonetheless, in the case of hedge funds, our recent experience may cast some doubt on the effectiveness of addressing these failures primarily through private institutions.

In addition to these market failures, there is another market failure that affects financial securities: insufficient provision of the public good of information about the quality of these products due to the high costs of collecting this information. We address this failure somewhat through mandatory disclosure requirements.¹¹⁹ Nonetheless, even with this information, it is still difficult to assess quality. As a result, a particular set of private institutions have arisen to provide the public good of information about credit securities: credit rating agencies such as Moody's and Standard and Poor's. However, the performance

¹¹⁹ See *supra* Part III (discussing disclosure requirements under federal securities laws).

of credit rating agencies as “gatekeepers” during the past ten years has been significantly criticized with many pointing to their failure as one of the principle causes of the current financial crisis.¹²⁰ In particular, conflicts of interests between the credit agencies and the financial firms evaluated by them but who pay these agencies fees suggest the difficulties in using private institutions in this case.

Instead, we should turn to public institutions and use government intervention to address the market failures caused by hedge funds. Our experiences with using government intervention to address market failures in environmental protection can be helpful in assessing alternatives for hedge funds. In environmental protection, the principal instrument is that of command-and-control regulation. Others include economic-incentive-based instruments such as tradable permit systems and tax systems.

A. Problems with Command-and-Control Regulation for Hedge Funds

One way to address these market failures would be to closely regulate hedge funds. This regulation could take a number of forms: specific reserve and margin requirements for certain types of trades, restrictions on other types of trades, and prohibitions on yet other trades. As noted above, a number of commentators have suggested additional regulation of hedge funds. However, there are a number of problems with regulating hedge funds.

Specific reserve and margin requirements would reduce the amount of leverage that a hedge fund can undertake. However, unless the specific requirements are connected to levels of liquidity risk,¹²¹ these requirements will not directly address liquidity risk. Indeed, as we have seen from bank runs, reserve

¹²⁰ See INFECTIOUS GREED, *supra* note 20; Frank Partnoy, *The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619 (1999); Frank Partnoy, *How and Why Credit Rating Agencies are Not Like Other Gatekeepers*, in FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? (Yasuyuki Fuchita & Robert E. Litan eds. 2006).

¹²¹ To be connected, the reserve and margin requirements would need to vary according to the level of liquidity risk.

requirements themselves can lead to a self-perpetuating cycle that increases liquidity risk.

Furthermore, recall the social benefits we derive from the operation of hedge funds, discussed in section II above. Regulations that prohibit strategies employed by hedge funds could eliminate many of these benefits.

More importantly, it is unlikely that any regulatory system would be able to keep up with the rapidly changing strategies of hedge funds.¹²² Hedge funds are under competitive pressure to innovate because strategies that were once successful are imitated to the point where competition over the same strategy erodes available profits.¹²³ Under constraints imposed by a fixed regulation, a hedge fund might devise a strategy around the regulation that achieves a similar result as the strategy nominally prohibited by the regulation. We have seen this before in the example of Bankers Trust developing an investment product to get around Japanese regulations restricting stock ownership by insurance companies. Indeed, as noted by Partnoy, the opportunity to work around existing regulations provides hedge funds opportunities to continue to extract significant profits: "Bankers Trust had demonstrated that regulation-avoiding trades were not only very profitable – they had staying power."¹²⁴ The ability to capture these profits will provide strong incentives for hedge funds to innovate around specific regulations, leaving them ineffective.

In the end, these regulations may end up being both detrimental and ineffective. As Richard Thaler has argued, "There's no evidence . . . that regulators could actually determine appropriate leverage for specific investments, for example, and [meanwhile,] 'heavy-handed regulation' could shut down financial markets and weaken the economy further."¹²⁵ Instead, it

¹²² Verret, *supra* note 44, at 799-800, notes, "[T]hese innovative strategies morph so rapidly and operationally they are so much leaner, that the simple regulatory strategies . . . do not lend themselves to cookie cutter application."

¹²³ See INFECTIOUS GREED, *supra* note 20, at 40-41.

¹²⁴ *Id.* at 72. See also *id.* at 49 ("Substantial fees from these complex swaps would persist so long as companies valued the difference in legal treatment between swaps and their regulated brethren.").

¹²⁵ Jeff Sommer, *When Humans Need a Nudge Toward Rationality*, N.Y. TIMES, Feb. 8, 2009, at BU4.

may be better to try a different approach for government intervention.

B. Economic-Incentive-Based Instruments: Permits & Taxes

In environmental protection, we have seen that command-and-control regulation can lead to significant improvements in environmental quality. However, when additional innovation is necessary, we sometimes turn to economic-incentive-based instruments like tradable permits or taxes. For example, in the 1990s, the Los Angeles area had the strictest air quality controls in the entire country. Nonetheless, additional improvements in air quality were needed. Rather than adopting additional regulations to control nitrogen oxides and sulfur oxides, the regulatory body for Los Angeles – the South Coast Air Quality Management District – decided to use a tradable permit system, RECLAIM, to enable stronger incentives to develop technological advancements in controlling emissions.¹²⁶

Economic-incentive-based systems are easier to manage in a dynamic environment than command-and-control systems. With economic-incentive-based systems, the regulatory agency uses a single variable to achieve desired environmental quality: with a permit system, the agency controls environmental quality by adjusting the quantity of permits available, and with a tax system, the agency controls quality by adjusting price, i.e. the amount of the tax. With a command-and-control system, the agency has to adjust technological rules imposed on a variety of different industries, and these technologies are constantly shifting.

In theory, a permit system should be able to achieve the same result as a tax system, as seen above.¹²⁷ However, in practice, certain considerations lead to the use of either a permit system or a tax system.¹²⁸ One key consideration is the amount of information needed by the agency. To determine an optimal

¹²⁶ See Thompson, *supra* note 86.

¹²⁷ See *supra* Part IV.A and Figure 1.

¹²⁸ One big advantage of a permit system is the ability to “grandfather” permits to businesses that had been emitting previously. This grandfathering improves the political feasibility of a permit system.

quantity of permits, the agency needs information about the marginal benefit, marginal private cost, and the social cost of the externality. However, for the tax system, the only information required to determine the tax is the social cost of the externality.¹²⁹ Consequently, a tax system should be simpler to construct to address the externalities caused by hedge funds.

VI. THE SUPERFUND FOR HEDGE FUNDS

We have seen how the operation of hedge funds can lead to two market failures: liquidity risk and problems with using market prices for valuation. In general, it is better to use at least as many instruments as the number of goals to be achieved. Consequently, to address these two market failures, the Superfund for hedge funds will consist of two components: a tax on hedge funds, assessed depending upon the liquidity risk their transactions reflect; and a fund for purchasing securities whose value may not be reflected by current market prices. Additionally, certain components of command-and-control regulation will be needed to implement the Superfund.

A. History of the Superfund Under CERCLA

Before examining the details of the Superfund for Hedge Funds, it will be helpful to review the Superfund established to clean up contaminated sites. The Superfund arose out of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.¹³⁰ This Act provided for a "Superfund" to be established to pay for the cleanup of hazardous waste sites when potentially responsible parties (PRPs) could not be found or otherwise could not afford the cost of the cleanup. This Superfund was initially funded by an excise tax on "petroleum, petrochemicals and inorganic chemicals,"¹³¹ which

¹²⁹ Enforcement is also required under both permit and tax systems.

¹³⁰ 42 U.S.C. §§ 9601-9675 (2000). For more on CERCLA, see Dale B. Thompson, *Valuing the Environment: Courts' Struggles with Natural Resource Damages*, 32 ENVTL. L. 57 (2002).

¹³¹ Rashida Belal, *Superfund for Environmental Taxes, 1981 and 1982*, STATISTICS OF INCOME BULLETIN, Fall 1983, at 31, available at <http://apps.irs.gov/pub/irs-soi/83rpfallbul.pdf>.

were the products causing the contamination of these sites.¹³² The idea behind this tax was the “polluter pays” principle, which says that we should address the externality of environmental damage through a Pigouvian tax on those responsible for the damage. Because the chemical and petroleum industries were the ones who initially manufactured the products contaminating these sites, this tax was imposed on their products. However, some criticized this tax because it was not calibrated to impose a lower tax on those “who safely handle dangerous substances [and instead acts] to subsidize those who do not.”¹³³

Thus, the Superfund under CERCLA contained two components to address two market failures: overproduction of harmful substances (an externality) and inadequate provision of the public good of cleanup. The first was the tax on chemical and petroleum products to provide (imperfect) incentives to reduce the quantity sold of these potentially harmful products. And the other was the pooling of these tax revenues into a trust fund to pay for cleanup of hazardous sites. The Superfund for hedge funds will use a similar structure, although the tax will be calibrated to the level of liquidity risk, in order to provide improved incentives.

B. Pigouvian Tax to Address Liquidity Risk

The principal component of the Superfund will be a tax collected from hedge funds, designed to provide incentives to reduce liquidity risks. The tax should be set at levels that increase as the level of liquidity risk increases.¹³⁴ In order to assess this tax then, we will need appropriate models of how the particular strategies pursued by a hedge fund increases liquidity risks.

¹³² This tax was last collected in 1995. Meline G. MacCurdy, *Reinstatement of Superfund Tax Proposed in Congress, Presumed in Obama's Budget*, MARTEN LAW, Apr. 22, 2009, <http://www.martenlaw.com/newsletter/20090422-superfund-tax-reinstated>.

¹³³ Bruce Bartlett, *The Case Against a Value-Added Tax*, 468 HERITAGE FOUND. BACKGROUNDER 9 (1985) (quoting Richard A. Epstein, *The Principles of Environmental Protection: The Case of Superfund*, 2 CATO J. 9, 33 (1982)), available at <http://www.heritage.org/research/axes/bg468.cfm>.

¹³⁴ This article explains how liquidity risks lead to market failures, and hence need to be addressed. However, other forms of systemic risk such as counterparty risk could also be addressed by this tax system with the level of tax calibrated also with the level of other associated risks.

One model that has been popularly used by hedge funds themselves to assess their own risks is the Value-at-Risk (VaR) model.¹³⁵ The VaR model is used to construct an estimate of the maximum loss that can occur with a given probability over a period of time. This model became very popular, particularly after the free availability of the Risk Metrics software package from J.P. Morgan in 1994,¹³⁶ because it can be applied using a very limited amount of data.¹³⁷ However, many have criticized the use of these models to assess risk because they make unrealistic assumptions based upon incomplete historical data. For example, Andrew Lo argues that these models inadequately deal with “tail risk,” “nonlinear risks,” and “serial correlation.”¹³⁸ Indeed, some have suggested that overreliance on these models was one of the causes of our recent financial crisis.

Instead, we need to find other models to assess liquidity risks.¹³⁹ Lo has noted that “there has been much progress in the recent literature in modeling . . . liquidity risk.”¹⁴⁰ In particular, he explains, “[a] more immediate method for gauging the liquidity risk exposure of a given hedge fund is to examine the autocorrelation coefficients ρ_k of the fund’s monthly returns.”¹⁴¹ Other models for better understanding liquidity and other risks

¹³⁵ For more on Value-at-Risk, see MOORAD CHOUDHRY, AN INTRODUCTION TO VALUE-AT-RISK (4th ed. 2006).

¹³⁶ *Id.* at 30.

¹³⁷ Under the variance-covariance method, assumptions of normal distribution for returns and constant correlations of risk factors means that all that is needed to assess risk are variances and covariances. More sophisticated techniques such as Monte Carlo simulations can be applied, and use more information. *Id.* at 33-35.

¹³⁸ ANDREW W. LO, HEDGE FUNDS: AN ANALYTICAL PERSPECTIVE 7-30 (2008).

¹³⁹ Developing models to assess liquidity risks associated with hedge funds will be inherently difficult, because hedge funds seek new profit opportunities from trades that are “on the edge.” Nonetheless, it will be important to attempt to assess these risks, in order to institutionalize consideration of the externality effects of liquidity risks from these trades.

¹⁴⁰ LO, *supra* note 138, at 25 (citing RICHARD BOOKSTABER, A FRAMEWORK FOR UNDERSTANDING MARKET CRISIS, in RISK MANAGEMENT: PRINCIPLES AND PRACTICES (1999)); Richard Bookstaber, *Understanding and Monitoring the Liquidity Crisis Cycle*, 56 FIN. ANALYSTS J. 17 (2000); Duen-Li Kao, *Estimating and Pricing Credit Risk: An Overview*, 56 FIN. ANALYSTS J. 50 (2000)).

¹⁴¹ LO, *supra* note 138, at 26.

include “small-world” network models,¹⁴² phase-locking models,¹⁴³ and fractal models.¹⁴⁴

These models would then be utilized to construct estimates of liquidity risk associated with the trading strategies adopted by each fund. The level of tax assessed would then be calibrated to the level of risk. As a result of the tax, trading strategies that involve higher levels of risk will now have lower returns. In particular, leveraged trading strategies that inherently offer higher risks will face a higher tax. The tax then will therefore provide an incentive for hedge funds to choose strategies that have lower liquidity risks, thereby addressing this externality.¹⁴⁵

C. Superfund to Fund Purchases of Illiquid Securities

The second market failure that needs to be addressed by the Superfund is the inability of market prices to provide adequate information on market valuation. We have seen that under certain circumstances, the activity of hedge funds can lead to situations where market prices no longer provide sufficient information about the value of financial instruments. This can lead to a cycle in which these valuation problems increase liquidity risks, which in turn increase valuation problems, and so on. Some external action would then be necessary to break this cycle.

¹⁴² Network models examine how shocks in one part of a system are passed along to other parts along the network. See DUNCAN J. WATTS, *SMALL WORLDS: THE DYNAMICS OF NETWORKS BETWEEN ORDER AND RANDOMNESS* (Philip W. Anderson et al. eds., 1999), cited in LO, *supra* note 138, at 26.

¹⁴³ Phase locking models explain how seemingly uncorrelated returns become strongly correlated, due to the occurrence of a previously unobserved event. See LO, *supra* note 138, at 18-22.

¹⁴⁴ Fractal models suggest that returns do not conform with normal / Gaussian distributions (which are implicitly assumed in standard financial models such as the Capital Asset Pricing Model and Value-at-Risk), which state that extreme events occur with low probability. Instead, fractal models suggest that these extreme events may occur with much higher probability. See BENOIT MANDELBROT & RICHARD L. HUDSON, *THE (MIS)BEHAVIOR OF MARKETS* (2004).

¹⁴⁵ It should be noted that power of the tax is to not necessarily micro-manage each specific trade but more to instill an incentive system in which traders first recognize that risky trades may get taxed more later and to force that consideration into their decision matrix.

To address this, the Superfund for hedge funds would use a trust fund similar to the fund under the Superfund under CERCLA. The CERCLA Superfund provided centralized funding for cleanup of contaminated sites financed by the tax collected from the chemical and petroleum industries. Likewise, the Superfund for hedge funds would provide centralized funding for attempting to “clean up” the failure of market prices not reflecting valuation. It would do this by actively participating in purchases of the “toxic” financial instruments. By purchasing these toxic securities at a time when other market participants are unwilling to do so, the Superfund could then break the cycle and begin to move market transactions back to the point where market prices would reflect marginal valuations.¹⁴⁶

This trust fund would operate similarly to the Troubled Assets Relief Program (TARP) that is being applied currently by the United States Government. A significant difference though would be that while TARP is a temporary program, the Superfund would continue in operation to address this market failure. Under TARP, the U.S. Treasury can purchase “troubled” assets such as mortgages and other financial instruments. One of the major issues facing TARP is due to this market failure: how much should the Treasury pay for these “toxic” assets when the market prices no longer adequately reflect their true value?¹⁴⁷ Underpaying for these assets could “force institutions selling and others holding similar investments to register crushing losses that could deplete their capital and make it harder for them to increase lending,” while overpaying “would bail out the companies . . . at the expense of taxpayers.”¹⁴⁸

This article does not attempt to determine the correct way to value these assets. Rather than having the Superfund directly assess the value of these assets, an alternative has been suggested by Lucian Bebchuk.¹⁴⁹ Bebchuk proposes funding a num-

¹⁴⁶ It should be understood that while it is possible and preferable that the Superfund’s activities could break this cycle, other instruments may nonetheless still be necessary under certain circumstances. Nonetheless, the existence of the Superfund could reduce both the need for and the magnitude of these other instruments.

¹⁴⁷ Vikas Bajaj & Stephen Labaton, *Risks are Vast in Revaluation of Bad Assets*, N.Y. TIMES, Feb. 2, 2009, at A1.

¹⁴⁸ *Id.* at A11.

¹⁴⁹ See Bebchuk, *supra* note 10.

ber of financial managers in a competitive market, whereby the managers derive their payoff from long-term returns. For example, the total amount that the Superfund decides to use to purchase “toxic” assets could be divided between twenty different funds. This decentralized approach has significant advantages over a centralized approach conducted by a single government agency. As Bebchuk notes, “The competition among these 20 funds would prevent the price paid for the [toxic] assets from falling below fair value, and the fund managers’ profit incentives would prevent the price from exceeding fair value.”¹⁵⁰ Additionally, provision of competition would erode the monopsonistic market power that can result when there is a liquidity crunch.¹⁵¹ Bebchuk suggests this mechanism could be augmented by auctioning off the right to be one of these funds (and consequently using those auction revenues to help fund the purchases).¹⁵²

There are two historical factors that suggest this mechanism might be effective. One is the fact that when deposit insurance was introduced, although this insurance was incomplete (deposits only to a certain amount were covered), it nonetheless was effective in restoring confidence in the banks and reducing the incidence of bank runs. In a similar manner, although this Superfund would also be incomplete in that it would not be able to purchase all “toxic” financial assets,¹⁵³ nonetheless by breaking the liquidity risk cycle, it could lead to partial restoration of confidence of private actors in participating in the market for these assets.¹⁵⁴

¹⁵⁰ *Id.* at 5.

¹⁵¹ *See supra* section IV.B.

¹⁵² Bebchuk, *supra* note 10. The problem of the “winner’s curse” – in which there is a disincentive to bid because the winning bid represents the highest valuation and hence is almost surely an overestimate – can be addressed by proper auction design, such as allocating the twenty funds according to the top twenty bids but charging each one a fee equal to the twentieth highest bid.

¹⁵³ Recall that the scope of the Superfund for hedge funds is more limited than Schwarcz’s LPOLR. *See supra* text accompanying notes 65-66.

¹⁵⁴ As noted above, the goal of the Superfund is to be self-perpetuating, continually addressing the market failures caused by hedge funds specifically. It is not designed to address other financial sectors that are currently addressed through regulatory mechanisms. In contrast, the TARP is designed to address the full restoration of confidence in all financial sectors. While the actions of Superfund may be insufficient to achieve a

The Superfund would also benefit from the possibility that, given a broad portfolio and sufficient time, the depressed market transaction prices for these assets could eventually recover to the point where the fund overall could profit from its portfolio. In the case of Long Term Capital Management, we saw that the consortium that purchased a large portion of LTCM's assets at prices that were substantially depressed due to their associated liquidity risks was eventually able to profit from this purchase due to the eventual recovery of the market prices for these assets. If the Superfund's portfolio can show eventual gains, this will increase the feasibility of purchasing the portfolio with a given amount of taxes collected to finance the Superfund.

VII. COMMAND-AND-CONTROL COMPONENTS NECESSARY TO IMPLEMENT THE SUPERFUND FOR HEDGE FUNDS

In our experiences with environmental protection, we have seen that even when we choose to adopt an economic-incentive-based instrument, these instruments nevertheless may rely on elements from command-and-control regulation. In the 1990s, the air quality management district for the Los Angeles area attempted to implement an economic-incentive-based instrument for reducing emissions of three pollutants: nitrogen oxides (NO_x), sulfur oxides (SO_x), and volatile organic compounds (VOCs). It was able to implement an emissions market for NO_x and SO_x but not for VOCs. In an earlier article, this author determined that one of the principal obstacles to the VOC market was the lack of consensus on future VOC emissions abatement technology. For NO_x and SO_x, this consensus had been developed through the regulatory rulemaking process, but because VOCs were relatively unregulated, no similar consensus existed. This experience suggested that "command-and-control regulation may be a necessary prerequisite for the implementation of an emissions market."¹⁵⁵

Therefore, to properly implement the economic-incentivebased Superfund for hedge funds, we may also need to

complete restoration of confidence, the more limited goals must be remembered. See *supra* text accompanying notes 146-47.

¹⁵⁵ Thompson, *supra* note 86, at 694.

adopt certain command-and-control regulatory components. In the RECLAIM example, we saw that in order to allocate permits, we needed to know the inventory of existing emissions, i.e. what facilities were emitting how much pollutant. This was needed to provide a baseline, both from which to determine how many permits each firm would receive and also to assess the universe of firms emitting pollutants. This inventory required both a listing of facilities emitting pollutants and a detailed list of pollutant emissions from each facility.

In a similar manner, we will need to determine the universe of hedge funds conducting activities that may lead to liquidity risk. In order to do this, we will first need to “inventory” hedge funds. This would be done initially through a requirement to register all hedge funds. Then, we would need to know each individual fund’s “emissions.” This would be done with a requirement to report regularly the entire holdings of a fund. Based upon these holdings, the Superfund authority would then levy a tax on the hedge fund.

The requirement for a hedge fund to disclose its holdings to the Superfund authority would be very controversial. Hedge funds are extremely secretive about their trading strategies: “Trading strategies are highly proprietary and therefore must be jealously guarded lest they be reverse-engineered and copied by others.”¹⁵⁶ As a result, many would contest turning over their complete holdings to a regulator. As Richard Thaler has noted, “The trick is to try and figure out a way of forcing these firms to disclose more of what they’re doing without giving away so much that they can no longer make a living.”¹⁵⁷ One trick that might work is to have the fund turn over information with a significant lag, such as ninety days. As long as the effective tax on these strategies is transparent, the Superfund could collect lagged information on holdings and still provide disincentives

¹⁵⁶ LO, *supra* note, 138 at 2; *see also* INFECTIOUS GREED, *supra* note 20, at 88 (discussing the secrecy around the trading strategies used by John Meriwether at LTCM, even after close inspection); *id.* at 256 (noting that funds “needed to keep their strategies secret or other investors would mimic them, thereby eroding the profit opportunities”).

¹⁵⁷ Sommer, *supra* note 125.

against strategies that increase liquidity risk. Funds may be more willing to turn over lagged information.¹⁵⁸

Another command-and-control component arises from the calculation of this tax. The Superfund should base this tax on the level of liquidity risk associated with the holdings of the hedge fund. However, this brings up the issue as to how to assess the level of liquidity risk. In Section VI.B, we discussed possible techniques for assessing liquidity risk. However, the Superfund should strive to refine this assessment and make it as transparent as possible to increase its incentive effect.¹⁵⁹

The process of refining the accuracy of assessing liquidity risk is similar to determining appropriate technologies for emissions reductions. The process of determining appropriate emissions technologies is done through rulemaking, including notice and opportunities to comment. In a similar manner then, the Superfund should incorporate public rulemaking procedures to determine the best way to assess the liquidity risks of strategies pursued by hedge funds.¹⁶⁰ These public rulemaking procedures would also then improve the transparency of the tax,¹⁶¹ so that

¹⁵⁸ Even with a ninety day lag, hedge funds likely will still object to disclosing their trading positions. This is particularly true for funds with longer holding periods because the lagged holdings will reflect their long-term strategy. Funds might respond by “gaming” the disclosure – adjusting their positions right before their reporting date and then readjusting after reporting. Despite this possibility, the Superfund would need to rely on the promise of confidentiality to induce funds to report truthfully. This would likely take some time to develop trust in this confidentiality. An opposite response would be to increase the frequency of reporting and shorten the lag, i.e. the “stick” to the “carrot” of confidentiality.

¹⁵⁹ It should also be noted that assessment of this risk will require not only analysis of the data provided by hedge funds but also information on trading positions collected under the regulatory structure for other financial sectors.

¹⁶⁰ Rulemaking is also commonly applied to regulation of other financial sectors. For example, see Cindy R. Alexander & Yoon-Ho Alex Lee, *The Dynamics of SEC Rulemaking: Evidence on the Informational Environment around SOX Rules*, Presentation at Midwestern Law and Economics Association 2008 Annual Meeting, (October 4, 2008). The author would like to thank participants at this Meeting for this suggestion.

¹⁶¹ Another concern would be the level of the tax. While the tax should be set high enough to reduce liquidity risks, it should not be set so high that it discourages all trading. This can be accomplished by using a relatively low level of the tax at the beginning and periodically assessing whether the tax is effective at that level. As a pricing system, a tax has a large advantage over a permit system (in which you have to pre-determine the level of permits over time), due to the simpler method of making adjustments based on experience.

funds would better predict the level of the Superfund tax for a given strategy.¹⁶²

Thus, although the Superfund would primarily utilize market mechanisms to address the market failures of hedge funds, the ability to use these market mechanisms would depend on the application of these command-and-control regulatory components.

VIII. INTERNATIONAL COORDINATION

One obstacle that the Superfund would face in addressing these market failures is the possibility that, faced with the reporting and tax requirements of the Superfund, hedge funds would simply relocate out of the jurisdiction of the United States. If so, the effectiveness of the Superfund could be limited. To a certain degree, this possibility can arise under any approach to address the market failures of hedge funds: if full command-and-control regulation is chosen, hedge funds likewise might relocate. However, certain factors suggest this effect may be limited.

One is that the United States could impose its jurisdiction on a fund in which a United States citizen invests. International law would limit the amount of the tax that could be extracted from that fund to the amount represented by the proportional holdings of U.S. citizens in the fund, not the entire balance of the fund. Nonetheless, the registration and reporting requirements could remain valid.

A more effective response to this possibility would be through international coordination. International coordination is extremely difficult, partly due to the “free rider” effect. The “free rider” effect suggests that when faced with the decision as to whether to impose rules that bring concentrated costs on its own citizens but diffuse benefits to its own and other citizens, a jurisdiction will have the incentive to “free ride.” That is, rather than imposing the rules on its own citizens and receiving in-

¹⁶² As noted above, the Superfund tax can also address other types of risks associated with hedge funds’ investment choices. *See supra* note 139 and accompanying text. If so, these same rulemaking procedures can be utilized to determine the relative magnitudes of the taxes for different types of risks.

creased partially increased benefits, the jurisdiction will rely on the diffuse benefits from the rules already imposed on other jurisdictions, thus getting a “free ride” on the efforts of others.

Despite the difficulties of international coordination, there has been a growing recognition that this coordination is necessary for the financial system.¹⁶³ The effects of the current financial crisis have spread from the United States to countries around the world. Consequently, a number of European countries have begun to examine regulating hedge funds also.¹⁶⁴

Although he had previously “supported an industry-led ‘code of conduct’ for hedge funds,” European Central Bank President Jean-Claude Trichet recently proclaimed his support for regulating hedge funds: “The current crisis is a loud and clear call to extend regulation and oversight to all systemically important institutions—notably hedge funds and credit-rating agencies.”¹⁶⁵ Lord Adair Turner, chair of Britain's Financial Services Authority, also advocated possible regulation of hedge funds:

‘We allowed a series of near banks and shadow banks to grow without being regulated,’ . . . In a new regime, . . . one rule must be, ‘If it looks like a bank and quacks like a bank, we have to regulate it like a bank,’ . . . [including] wide discretion to get information on how hedge funds and other institutions are operating, with the ability to impose regulation if they start to act too much like a bank.’¹⁶⁶

Meanwhile, international hedge funds themselves see that regulation is coming and are attempting to preempt it through self regulation. Recently, the Alternative Investment Management Association, a leading British hedge fund association with

¹⁶³ See Floyd Norris, *Danger in Government Directing Capital*, N.Y. TIMES, Jan. 30, 2009, at B1 (noting that “there is much talk about how to reform the regulatory systems around the world, and how to standardize regulation to avoid the ‘regulatory arbitrage’ of seeking out jurisdictions with the least stringent rules.”).

¹⁶⁴ See Dixon & Beales, *supra* note 117 (noting that “the political momentum for regulating shadow banks is building in advance of a meeting in April in London of representatives of the Group of 20 economies.”).

¹⁶⁵ Joellen Perry & Gabriele Parussini, *Trichet Backs Increase in Market Regulation*, WALL ST. J., Feb. 24, 2009, at A10.

¹⁶⁶ Norris, *supra* note 163, at B4.

international membership, announced its planned proposal that “hedge-fund managers agree to changes . . . includ[ing] registering with regulators and having regular contact with authorities about their businesses.”¹⁶⁷ As other countries and the funds themselves recognize that prevention of future crises will require concerted effort, international coordination of approaches to hedge funds will become more feasible.

CONCLUSION

The depths of the current financial crisis cry out for drastic solutions. Some have called for new regulations, including registration requirements, reporting of assets, reserve requirements, restrictions on leverage, and restrictions on trading strategies. Others have called for taxing all financial service transactions. Others have called for the establishment of a government agency to purchase “toxic” financial assets, thereby becoming a “liquidity provider of last resort.”

This article argues that the appropriate long-term solution to the problems presented by hedge funds is a combination of these approaches: establishment of a Superfund consisting of the market mechanisms of a tax on hedge funds, whose funds are then used to conduct market purchases of “toxic” financial assets, all of which supported by regulations necessary to operate these market mechanisms. This article develops this solution by focusing on the market failures caused by hedge funds and then considering possible solutions through the prism of our past experiences with environmental protection.

The two principal market failures caused by hedge funds are externalities posed by liquidity risks and the inability of market prices to provide information about the valuation of financial securities. Our experiences with the difficulties in using command-and-control regulation to reduce the environmental impact of industries engaged in rapid technological change suggest that the use of command-and-control regulation as the primary instrument to address innovative hedge funds will be in-

¹⁶⁷ Cassell Bryan-Low, *Hedge Funds to Propose Overhaul Plan*, WALL ST. J., Feb. 24, 2009, at C3.

appropriate. Instead, these experiences suggest an alternative structure of the Superfund.

While there were many problems with the implementation of the original Superfund for the petroleum and chemical industries,¹⁶⁸ nonetheless, the basic structure was sound: combine a tax to create incentives to reduce risky behavior and then use the tax revenues to fund cleanup of toxic sites. The Superfund for hedge funds proposed here adopts the same structure to address these two market failures caused by hedge funds: a tax calibrated with the levels of liquidity risk to reduce the incidence of externalities associated with liquidity risk and then the use of those funds to help "clean up" the problem of illiquid securities whose market prices do not reflect valuation. This cleanup could be done by providing government funding of a number of competitive financial managers, whose compensation would depend upon long-term returns.

Our experiences with environmental protection also suggest that market instruments need to be built upon a foundation of command-and-control regulatory components. Consequently, to implement these market mechanisms to address the market failures of hedge funds, we will likewise need supporting regulatory elements. These elements include registration of hedge funds, reporting of the funds' assets, and rulemaking procedures to assess liquidity risks.

The registration and reporting requirements under the Grassley-Levin legislation is the first step to complete the Superfund package. Additional legislation would be needed to authorize a tax on hedge funds, create the rulemaking procedures for assessing liquidity risks, and enable the use of the hedge fund tax revenues for funding a competitive market in illiquid financial securities.

When completed, the Superfund for hedge funds will provide an adaptive, flexible mechanism for addressing the market failures caused by hedge funds.¹⁶⁹ Unlike command-and-control

¹⁶⁸ See Bruce Yandle, *Taxation, Political Action, and Superfund*, 8 CATO J. 751 (1989).

¹⁶⁹ As noted above, this Superfund structure could also be extended to cover other financial sectors. See *supra* note 6 and accompanying text.

regulation that would limit investment strategies and the creation of new financial instruments, the tax and market purchase programs would allow innovation by hedge funds. Meanwhile, because they are not tied to any particular strategies or financial securities, the tax and market purchase programs could adapt to these innovations in order to provide incentives to reduce the externalities of liquidity risks, and to provide a mechanism for moving transactions in illiquid financial instruments back to the margin where market price will then provide useful information on valuation.

We see then that one “invisible hand”—market price—is not sufficient to keep hedge funds along the correct path. But with two more “invisible hands”—the liquidity risk tax and market purchase program for illiquid securities, the Superfund for hedge funds will “nudge” hedge funds in the right direction.

FIGURES

Figure 1: Externalities

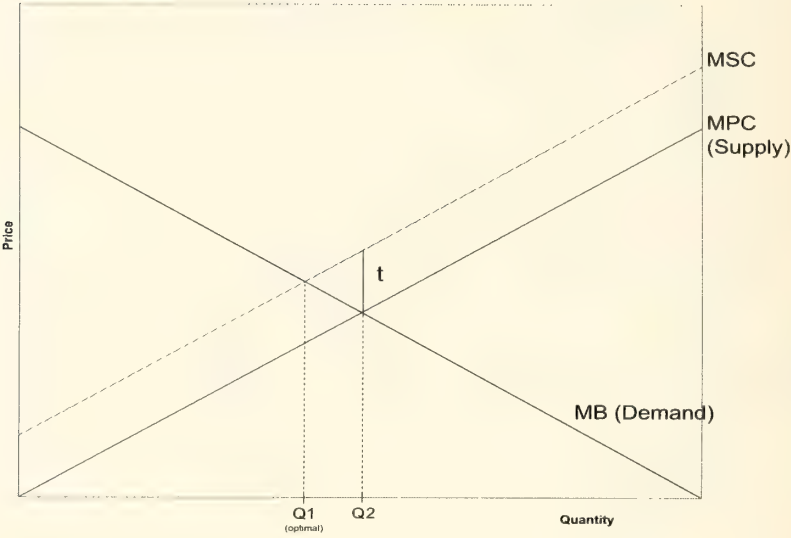


Figure 2: Competitive Equilibrium

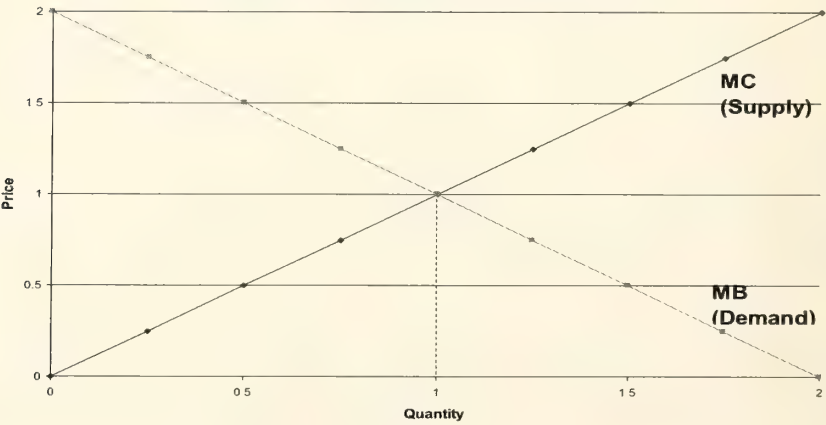


Figure 3: Alpha Stock, Case I

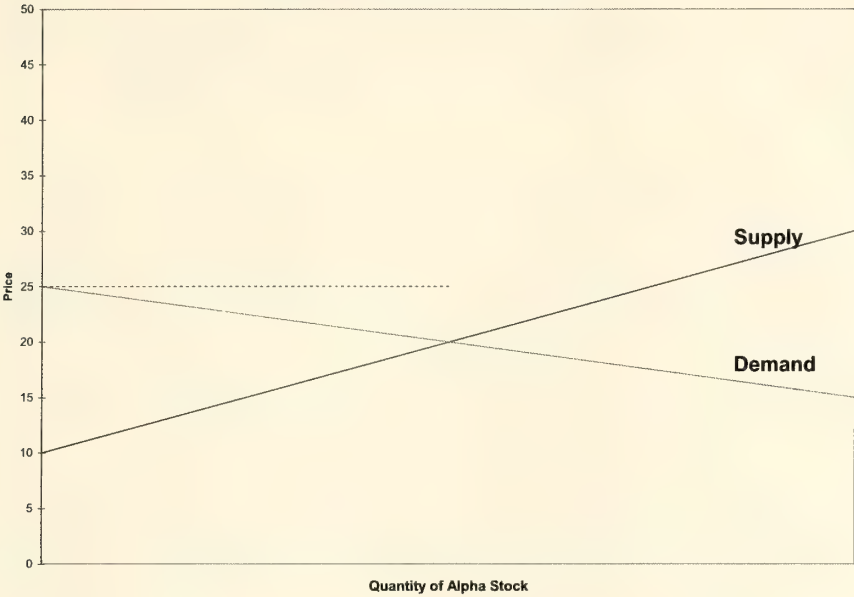
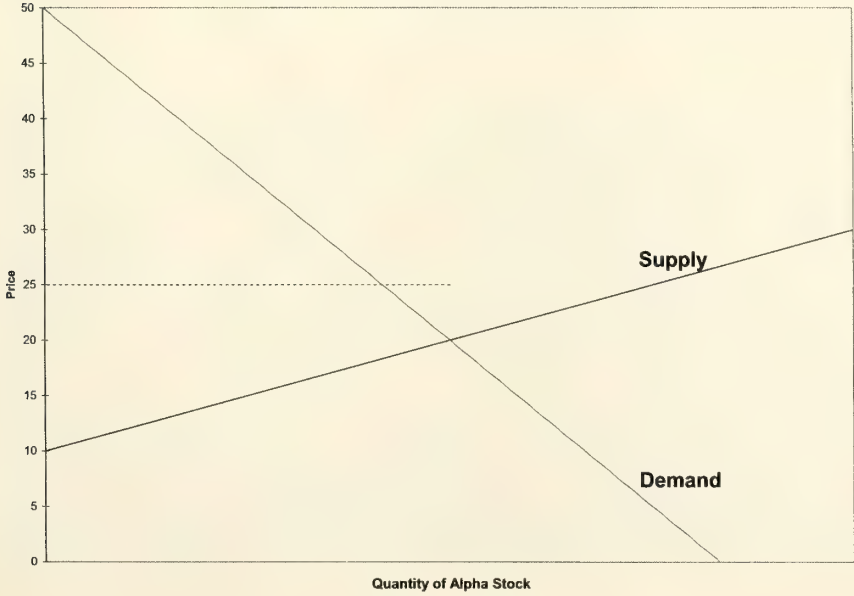


Figure 4: Alpha Stock, Case II



COMMENT

THE CURIOUS CASE OF KEVIN TRUDEAU, KING CATCH ME IF YOU CAN

If you have ever watched late night television, you have probably stumbled across the cure for cancer, debt, and obesity all thanks to Kevin Trudeau's infomercials promoting his books that have the answers to almost everything. The self proclaimed "consumer advocate" has written books where he claims to blow open the conspiracy against the American consumer.¹ Oozing with slick, televangelist style during every infomercial, Trudeau vaguely explains how doctors, pharmaceutical companies and the government are in bed together in a super-sized plot to keep America sick and overweight.² Trudeau's ranting less resembles science and more the plot of the latest bestseller partly because his lack of evidence and his blatant refusal to ground any of his theories in reasonable proof.³ In the infomercial for his controversial book, *The Weight Loss Cure "They" Don't Want You to Know About*, he praises a miracle cure that was discovered in

¹ KEVIN TRUDEAU, NATURAL CURES "THEY" DON'T WANT YOU TO KNOW ABOUT (Alliance Publishing Group, Inc. 2004). All books contain a disclaimer at the beginning where Trudeau seems to candidly announce that he is not a doctor, accountant, or financial planner but a reporter, that the book is for educational or entertainment purposes only, and that dates, names, locations, and actual events have been changed or made up for fun. See *id*; KEVIN TRUDEAU, MORE NATURAL "CURES" REVEALED: PREVIOUSLY CENSORED BRAND NAME PRODUCTS THAT CURE DISEASE vii (Perseus Publishing 2008); KEVIN TRUDEAU, THE WEIGHT LOSS CURE "THEY" DON'T WANT YOU TO KNOW ABOUT ix (Alliance Publishing Group, Inc. 2009); KEVIN TRUDEAU, DEBT CURES "THEY" DON'T WANT YOU TO KNOW ABOUT vii (Equity Press 2009). To get points of emphasis across to his readers, Trudeau litters his books with bold type and scream caps. Thus, not only has his message been criticized but also his writing style. Christopher Dreher, *What Kevin Trudeau Doesn't Want You to Know*, July 29, 2005, <http://dir.salon.com/story/books/feature/2005/07/29/trudeau/index.html> ("His prose style mimics the gibberish favored by online spam advertisements, he frequently uses SCREAM CAPS to emphasize OBVIOUS POINTS.").

² Kevin Trudeau, http://en.wikipedia.org/wiki/Kevin_Trudeau (last visited Oct. 10, 2009) ("Trudeau says that pharmaceutical companies 'don't want us to get well' because curing disease is not nearly as profitable as treating it in perpetuity.").

³ Copeland, *infra* note 7.

the 1950's by Dr. A.T.W. Simeons.⁴ However, he fails to tell the consumers exactly what his miracle cure entails: a rigorous four phase diet plan that has a strict five hundred calorie limitation, recommends fifteen colonics in thirty days, recommends injections of a drug that is unavailable in the United States for weight loss, and a host of many other limitations.⁵

His *Weight Loss Cure* book and accompanying infomercials were not the first time Trudeau, who never attended college or medical school, peddled miracle cures to the unwitting public. This convicted felon⁶ "has been remarkably successful doing infomercials for everything from how to achieve a photographic memory to how to cure your addictions to how to beat cancer by ingesting a particular type of calcium that, as fate would have it, he also happened to sell."⁷ In fact, he is so slick that he could sell you the shirt off of your own back, and you would walk away beaming over the great deal you just got.⁸ Trudeau's fortune, of which the exact amount is unknown, has been made by selling modern snake oil that has been swallowed by millions.

I. THE MAN BEHIND THE INFOMERCIAL

Born February 6, 1963 and adopted by Robert and Mary Trudeau of Lynn, Massachusetts, Kevin Trudeau showed an early drive for monetary success by working odd jobs as a youth, often at the expense of his studies.⁹ Trudeau's charm and success were noticed at an early age by his peers who voted him "Most Likely to Succeed" during his senior year.¹⁰ "[B]y the age of twenty or [twenty-one he] was more successful than he had

⁴ KEVIN TRUDEAU, THE WEIGHT LOSS CURE "THEY" DON'T WANT YOU TO KNOW ABOUT 43-44 (Alliance Publishing Group, Inc. 2007) (discussing Dr. Simeons's manuscript *Pounds and Inches: A New Approach to Obesity*).

⁵ WEIGHT LOSS CURE, *supra* note 1, at 73-114.

⁶ Kevin Trudeau, *supra* note 2.

⁷ Libby Copeland, *Wait, There's More*, WASH. POST, Oct. 23, 2005, at D1.

⁸ *Id.*

⁹ Letter from Daniel W. Schwartz, M.D., Diplomate, American Board of Forensic Psychiatry, to Berry M. Fallick, esq. (Apr. 7, 1991) (on file with author) (discussing Trudeau's family history and early work history ranging from newspaper boy to professional magician). "He was driven to keep proving himself, as a way of counteracting the criticisms he had sustained from his adoptive parents, teachers and friends, and the feeling that he had been abandoned by his real mother." *Id.*

¹⁰ Kevin Trudeau, *supra* note 2.

ever imagined.”¹¹ The man who would become a controversial infomercial star was never one to compartmentalize his business ventures; he has been featured in infomercials, written quack books that sell like hotcakes, and founded the international pool tournament for which he could not pay the prize money.¹² However, as Trudeau quickly climbed the ladder of success, his legal woes were just beginning.

In 1990, Trudeau was convicted of grand larceny for which he served ten days of a twenty-one day sentence.¹³ Trudeau explained that he had “inadvertently” withdrawn eighty thousand dollars from an account in Massachusetts based on checks that he had deposited but had not cleared.¹⁴ He claimed this was because his secretary embezzled the money, but others, including the criminal justice system, simply called this check kiting.¹⁵ To make his scheme seem more legitimate, he even posed as a doctor, but Trudeau claims the doctor title was a silly misunderstanding because he jokingly referred to himself as a “doctor in memory” when he “inadvertently” withdrew the money from the bank.¹⁶

Only one year later, Trudeau was desperate for assets to fund and operate his American Memory Institute, so he tried a little credit card fraud on for size.¹⁷ He obtained and fraudulently used, to the tune of \$122,735.68, eleven credit cards for which he served two years in federal prison.¹⁸ He explained his actions by saying “because he paid a bill late, which led to American Express giving him a bad credit rating . . . [N]o one would give him a credit card, . . . he had little choice but to apply for cards

¹¹ Letter from Daniel W. Schwartz, *supra* note 9.

¹² Kevin Trudeau, *supra* note 2. The International Pool Tournament in Reno, Nevada was dealt a devastating blow when Trudeau could not pay the prize money. This sent shock waves throughout the pool community. *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Copeland, *supra* note 7.

¹⁷ Letter from Daniel W. Schwartz, *supra* note 9.

¹⁸ Copeland, *supra* note 7. Two of the cards were from purchasers of his Memory System, and nine were obtained with a false social security number. See Kevin Trudeau, *supra* note 2.

with fake Social Security numbers.”¹⁹ Trudeau’s true colors were beginning to show. Dr. Daniel Schwartz’s 1991 psychological evaluation shed a little light into Trudeau’s nature when he said “Mr. Trudeau’s drive to succeed has been so intense that it has on numerous occasions impaired his judgment.”²⁰ Interestingly, the doctor did not characterize the man with the “outgoing personality that should thrive in [a commercial] enterprise” as antisocial or inherently criminal.²¹ The Federal Trade Commission, the courts, and many American consumers may have a drastically different view on Kevin Trudeau.

Trudeau regrouped and tried a third criminal venture in 1996 when he and fellow prison buddy, Jules Leib,²² were charged with running an illegal pyramid scheme.²³ Within Nutrition for Life, Trudeau Marketing Group created its own distributor agreement that made up the pyramid scheme.²⁴ For Trudeau Marketing Group, Trudeau and Leib enticed individuals to attend recruitment meetings where they were asked to purchase membership in the “Instant Executive Program,” which made its money not from products sold but from members recruited.²⁵ Former president of Nutrition for Life, David Bertrand, called Trudeau “brilliant” and “one of the best salespeople [he] has ever known” because he “could sell [anything]

¹⁹ Copeland, *supra* note 7. Showing little, if any, remorse for his crimes, Trudeau said “[y]’know, I’ve been focused on making money and what I did was wrong -- even though it wasn’t a heinous crime and I could justify it nine different ways.” *Id.*

²⁰ Letter from Daniel W. Schwartz, *supra* note 9. Trudeau’s intellectual brilliance is driven by a “subconscious urge to succeed.” *Id.*

²¹ *Id.*

²² Copeland, *supra* note 7. Jules Leib and Trudeau met in prison on the West Coast where Leib was serving time for attempted distribution of cocaine. *Id.*

²³ An illegal pyramid scheme is a marketing scheme based primarily on the recruitment of new members rather than the sale of products. “Pyramids are illegal across the country because they are mathematically doomed to fall apart. Those who enter the pyramid last always lose money.” *Ryan’s Sweeping Settlement with Trudeau Protects Consumers & Nets \$185,000 for Eight States*, <http://libocceclub.com/nfliagmt.html> (last visited Oct. 16, 2009).

²⁴ Nutrition for Life is a multi-level marketing company where salespeople earn money off of the sales made in addition to getting a percentage of the sales made by distributors they recruit. *Id.* The company was not a defendant in any lawsuit but entered into negotiations voluntarily. *Id.*

²⁵ *Ryan’s Sweeping Settlement with Trudeau Protects Consumers & Nets \$185,000 for Eight States*, *supra* note 23. The program required members to buy \$1000 worth of products, a \$35 start-up kit, and \$135 worth of products each month. *Id.*

because he seemed to really believe in what he was saying . . . but he repeatedly took it too far.”²⁶

Here Trudeau began mastering how to promise without performing. Bertrand learned that “Trudeau had promised free trips to entice people to sign up as distributors,” but the trips never materialized and understandingly people complained, so Nutrition for Life bailed Trudeau out by funding a weekend cruise for thousands of people.²⁷

The state of Illinois sued Trudeau and Leib for the illegal pyramid scheme, and the two men settled the charges by paying \$185,000 to eight states.²⁸ Trudeau later explained his past transgressions by saying that he was caught up in the fast life of making money.²⁹ But perhaps he is still there.

II. LET THE GAMES . . . LITIGATION BEGIN

Trudeau had gotten a taste of scamming America that would whet his appetite for more. Since he has said “greed supersedes everything,”³⁰ Trudeau turned his efforts from the criminal world to infomercials and tapped into abundant wealth first through peddling fraudulent products, then hiding behind the First Amendment³¹ by writing quack self-help style books. As Alex Jones so eloquently observed, Americans have a “right to buy crap,” and “Trudeau has the right to sell, write, and say anything.”³²

²⁶ Copeland, *supra* note 7.

²⁷ *Id.* Bertrand defended Trudeau by saying that “[a]t the time he made the promise he fully intended to comply, . . . [h]e always intends to but he kind of gets carried away in his exuberance.” *Id.*

²⁸ The states were Illinois, Hawaii, Idaho, Kentucky, New Jersey, Michigan, Missouri, and Pennsylvania. One hundred twenty five thousand dollars of the total amount was paid to Illinois alone. *Ryan’s Sweeping Settlement with Trudeau Protects Consumers & Nets \$185,000 for Eight States*, *supra* note 23.

²⁹ Copeland, *supra* note 7.

³⁰ Interview by Alex Jones with Kevin Trudeau, Author of *The Weight Loss Cure “They” Don’t Want You to Know About* (May 26, 2009).

³¹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

³² Interview by Alex Jones with Kevin Trudeau, *supra* note 30.

A. Federal Trade Commission

The Federal Trade Commission (FTC) has a drastically different view from Alex Jones. The FTC is responsible for enforcing federal consumer protection laws that prohibit fraud, deception and unfair business practices.”³³ Declaring that “unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful,” the FTC targets advertisements for food, drugs, devices, services, or cosmetics.³⁴ “An advertisement is false if it is ‘misleading in a material respect.’”³⁵ This simply means, according to the FTC’s Policy Statement on Deception, that “a material misrepresentation ‘involves information that is important to consumers and, hence, likely to mislead them and, hence, likely to affect their choice of, or conduct regarding, a product.’”³⁶

The FTC has unsuccessfully attempted to stop Trudeau’s fleecing of American consumers through litigation.³⁷ While the FTC’s actions centered on holding Trudeau in contempt of court for various violations of court orders and injunctions, the Mirror Image Doctrine had been used by the FTC in the past to prosecute other violations of false and deceptive trade practices.

The Mirror Image Doctrine was established in 1971 and was dropped from the books in May 2009, perhaps in response to the West Virginia Law Review article by Keith R. Fentonmiller³⁸ or perhaps in response to Kevin Trudeau. The FTC’s given

³³ Keith R. Fentonmiller, *Reflection on the Mirror Image Doctrine: Should the Federal Trade Commission Regulate False Advertising for Books Promising Wealth, Weight Loss, and Miraculous Cures?*, 110 W. VA. L. REV. 573, 574 (2008). See 15 U.S.C. § 41-58 (2006).

³⁴ 15 U.S.C. §§ 45(a)(1), 52(a)(9).

³⁵ Fentonmiller, *supra* note 33, at 574.

³⁶ *Id.* (quoting *In re Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 165 (app.) (1984)).

³⁷ See, e.g., *FTC v. Trudeau*, FTC File No. 942 3278 (N.D. Ill. Jan. 12, 1998), available at <http://www.ftc.gov/os/caselist/kevintrudeau.shtm>; see also *FTC v. Trudeau*, No. 98 Civ. 0168 (N.D. Ill. Sept. 7, 2004); *FTC v. Trudeau*, 567 F. Supp. 2d 1016 (N.D. Ill. 2007); *FTC v. Trudeau*, 572 F. Supp. 2d 919 (N.D. Ill. 2008); Supplemental Order and Judgment, *FTC v. Trudeau*, No. 03 Civ. 3904 (N.D. Ill. Nov. 4, 2008); *FTC v. Trudeau*, No. 08-4249, 2009 WL 2615822 (7th Cir. Aug. 27, 2009). See generally Federal Trade Commission, A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, <http://www.ftc.gov/ogc/brfovrwv.shtm> (discussing the FTC’s administrative and judicial enforcement authority).

³⁸ Fentonmiller, *supra* note 33, at 573.

reason for the removal of the doctrine is akin to bureaucratic housekeeping in that the Mirror Image Doctrine was unnecessary given Supreme Court decisions applying the First Amendment to truthful and non-deceptive advertising.³⁹ The Mirror Image Doctrine which protected advertisements that in essence mirrored the product advertised read:

The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: Provided, The advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of statements quoted or derived from the contents of the publication...Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosure have been made. This policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.⁴⁰

Fentonmiller, an FTC staff attorney, argued that the Mirror Image Doctrine represented a “significant loophole” that hampered the agency’s efforts to clean up deceptive advertising.⁴¹ Because of the gaping hole, an author could meet the minimal requirements of the FTC’s Mirror Image Doctrine and still sell legally bogus material to the unsuspecting consumer. Trudeau jumped through the loophole with both feet because the Mirror Image Doctrine held advertisers liable for false advertising only if the advertisement misrepresented the content of the book, not if the advertising claims themselves, which fully mirror the book, were unsubstantiated.

With the faulty Mirror Image Doctrine off the books, the FTC has little, if anything left in its bag of tricks with which to hold advertisers like Trudeau liable for their conduct. Therefore, the FTC has little option but to go after the advertisers’ pocket-

³⁹ Gary D. Hailey & Jeffrey D. Knowles, *Legal Review: The FTC ‘Disappears’ Its Mirror Image Doctrine*, RESPONSE MAGAZINE, May 1, 2009, <http://www.responsemagazine.com/resources/legal-resources/legal-review-the-ftc-039disappears039-its-mirror-image-doctr-1379>.

⁴⁰ Advertising in Books, Enforcement Policy, 36 Fed. Reg. 13414 (Jul. 21, 1971).

⁴¹ Hailey and Knowles, *supra* note 39.

books, but thus far, nothing has put even a dent into Trudeau's massive and elusive fortune.⁴² Trudeau even said "freezing [his] assets will not do anything," and "thirty-seven million dollars will not break me or change my lifestyle."⁴³ Every time the FTC tries to stop Trudeau, he slips in between the gaps in the law to trot off into the sunset with his bags of money in hand smirking as he tauntingly yells over his shoulder, "catch me if you can."

B. Infomercials in 1998

Imagine a simple colon cleanse that will rid your body of toxins which cause fatigue, headaches, depression, arthritis, and other ailments. What about the cure for baldness? Wouldn't a cure for all addictions from smoking to heroin be wonderful? Would you like a photographic memory or like to become a mega reader? In 1998, Trudeau was featured in several infomercials peddling products which he alleged did all of these things and more.⁴⁴ In its suit against Trudeau, the FTC alleged that, through the infomercials, he violated 15 U.S.C. § 45 (a) by using false and misleading advertising which "constitute[d] deceptive acts or practices in or affecting commerce."⁴⁵ Additionally, nowhere in the infomercials that were thirty minute segments devoted to the promotion of a particular product did Trudeau ever disclose that the segment was a paid advertisement. According to the FTC's complaint, this constituted a violation of 15 U.S.C. § 45(a) as well because the format was deceptive.⁴⁶ The action

⁴² In his interview with Alex Jones, Trudeau brags about companies and assets around the world that the FTC cannot touch. Interview by Alex Jones with Kevin Trudeau, *supra* note 30.

⁴³ *Id.* (referencing *FTC v. Trudeau*, No. 03 Civ. 3904 (N.D. Ill. Nov. 4, 2008)), available at <http://www.ftc.gov/os/1998/01/trudeau.cmp.htm> (supplemental order and judgment which granted the FTC a \$37.6 million contempt verdict against Trudeau)).

⁴⁴ See generally Complaint, *FTC v. Trudeau*, FTC File No. 942 3278 (N.D. Ill. Jan. 12, 1998), available at <http://www.ftc.gov/os/1998/01/trudeau.cmp.htm> (discussing the infomercials for Eden's Secret Nature's Purifying Product, Sable Hair Faming System, Jeanie Eller's Action Reading, Dr. Callahan's Addiction Breaking Technique, Kevin Trudeau's Mega Memory, and Howard Berg's Mega Reading).

⁴⁵ *Id.*

⁴⁶ *Id.*

seeking both preliminary and permanent injunctions never went forward because Trudeau settled.⁴⁷

In the settlement, Trudeau paid \$500,000 in consumer redress; established a performance bond of \$500,000; was barred from making false claims about any product in the future; was barred from misrepresenting the existence, contents validity, results, conclusions or interpretations of any test, study or research; required to have substantiation, which when appropriate could be scientific, for claims concerning the benefits, performance or efficacy of any product or program he advertised, promoted, sold or distributed; and required to use the following disclosure: "THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OF SERVICE]" in TV and radio advertisement of a certain length.⁴⁸ Trudeau's half a million dollar settlement contributed to almost one half of the total settlement of \$1.1 million dollars.⁴⁹ While monetarily small this settlement proved to be the driving force behind all future actions against Trudeau. However, in this litigious game of cat and mouse that would go on between the FTC and Trudeau for over a decade, Trudeau managed to stay just one step ahead.

C. Coral Calcium and Biotape in 2003

In 2003, Trudeau again tried his hand at the infomercial market by advertising Coral Calcium and biotape. Coral Calcium was a product that allegedly could cure cancer, multiple sclerosis, heart disease, lupus, and chronic high blood pressure,

⁴⁷ Individual actions were also filed against other participants in the infomercials and product developers: Mega Systems International, Inc. (infomercial producer), Jeffrey Salberg (infomercial producer), Kenneth Wright (Eden's Secret), Roger J. Callahan (Addiction Breaking), Jeanie Eller (Action Reading), Howard Berg (Mega Reading), Tru-Vantage, and Jacqueline Sable (Hair Farming). All of the above, except Jacqueline Sable, settled their individual FTC actions out of court. See <http://www.ftc.gov> (last visited Nov. 16, 2009).

⁴⁸ *FTC v. Trudeau*, FTC File No. 942 3278 (N.D. Ill. Jan. 12, 1998) (Stipulated Order for Permanent Injunction and Final Judgment Against Kevin Trudeau) (on file with author), available at <http://www.ftc.gov/os/1998/01/trudeau.ord.htm>; Press Release, Federal Trade Commission, Infomercial Marketers Settle Various Charges: Ad Claims for "Hair Farming," "Mega Memory System," "Addiction Breaking System," "Action Reading," "Eden's Secret," and "Mega Reading" Were Deceptive (Jan. 13, 2008) (on file with author), available at <http://www.ftc.gov/opa/1998/01/megasyst.shtm>.

⁴⁹ Press Release, Infomercial Marketers, *supra* note 48.

just to name a few. The FTC challenged that "these and other claims go far beyond existing scientific evidence regarding the recognized health benefits of calcium."⁵⁰ In the infomercials for Coral Calcium, Trudeau, along with Robert Barefoot, who was called Dr. Barefoot in the infomercials despite not having a medical or doctoral degree,⁵¹ raved about the benefits of the "supplement purportedly comprised of marine coral from Okinawa, Japan," and the price was a steal at ninety capsules, the equivalent of a one month supply, for a mere \$19.95.⁵² Biotape was a "purported pain-relief product"⁵³ that sold in strips of ten for meager \$10 a package. The user simply placed the adhesive tape wherever pain occurs and should feel relief for "debilitating back pain, and pain from arthritis, sciatica, and migraines."⁵⁴

The FTC took action against Trudeau individually and against others involved in the marketing or sales of either product.⁵⁵ Charging Trudeau with violating the 1998 order by making unsubstantiated claims about both products, the FTC sought a finding of contempt as well as monetary and injunctive relief.⁵⁶ The FTC was essentially petitioning the court for the

⁵⁰ Press Release, Federal Trade Commission, FTC and FDA Take New Actions in Fight against Deceptive Marketing: FTC Charges Marketers of Coral Calcium Supreme Dietary Supplement and a Pain-Relief Product with Making False and Unsubstantiated Claims (June 10, 2003) (on file with author), available at <http://www.ftc.gov/opa/2003/06/trudeau.shtm>.

⁵¹ Stephen Barrett, M.D., *Be Wary of Coral Calcium and Robert Barefoot*, Quackwatch, Jan. 25, 2004, <http://www.quackwatch.org/01QuackeryRelatedTopics/DSH/coral.html> (discussing Barefoot's dubious claims and questionable credentials, Coral Calcium's cost considerations and safety considerations, and government action).

⁵² See *supra* note 50 and accompanying text.

⁵³ *Id.*

⁵⁴ Press Release, Federal Trade Commission, Kevin Trudeau Banned from Infomercials: Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape (Sept. 7, 2004) (on file with author), available at <http://www.ftc.gov/opa/2004/09/trudeaucoral.shtm>.

⁵⁵ This paper will focus on the action against Trudeau, but for information on the suit against Kevin Trudeau, Shop America (USA), LLC, Shop America Marketing Group, LLC, Trustar Global Media, Limited, Robert Barefoot, Deonna Enterprises, Inc., and Karbo Enterprises Inc. see *FTC v. Trudeau*, No. 03 Civ. 3904 (N.D. Ill. Sept. 7, 2004) which settled six months before Trudeau's individual action.

⁵⁶ Press Release, FTC and FDA Take New Actions, *supra* note 50. In addition to claiming that Coral Calcium cured cancer and other diseases, Trudeau and Barefoot falsely claimed to cite published studies from reputable medical journals supporting their claims. Coral Calcium, they claimed, provided the same amount of bioavailable calcium as two gallons of milk, and that the body absorbs significantly more of the cal-

same redress sought in 1998. The 1998 order did not work in preventing the Coral Calcium or Biotape infomercials, so why would the same penalties in 2003 prevent Trudeau from future misconduct? However, the FTC trudged onward with its action.

"In July 2003, Trudeau entered into a stipulated preliminary injunction that prohibited him from continuing to make the challenged claims for Coral Calcium Supreme and Biotape."⁵⁷ Showing little regard for the court, Trudeau disseminated a direct mail piece saying that "the Federal Trade Commission forbids us from saying that Calcium prevents, or even possibly even cures cancer, heart disease, diabetes, and pain - - even if its [sic] true. . . . but, whatever it does, it only takes about 3-6 months before most people start to feel the difference in their own health."⁵⁸ The letter was mailed to more than 350,000 consumers and netted an additional two million for Trudeau.⁵⁹ The court held Trudeau in contempt for violating the

cium in Coral Calcium, up to one hundred times more, and at a significantly faster rate. *Id.*

⁵⁷ Press Release, Kevin Trudeau Banned, *supra* note 54.

⁵⁸ Memorandum in Support of Plaintiff's Motion to Find Defendant Kevin Trudeau & Third Party Trustar Marketing Corp. in Civil Contempt for Violating the Preliminary Injunction at 1, FTC v. Trudeau, No. 98 Civ. 0168, 2004 WL 3722527 (N.D. Ill. June 7, 2004) (No. 03-3904) [hereinafter Civil Contempt Memorandum]. Additionally, Trudeau violated the preliminary injunction by airing the Whistle Blower Infomercial which advertised his book, *Natural Cures "They" Don't Want You to Know About*. In the infomercial Trudeau claimed "that there are specific branded products that are effective in treating and curing diseases such as cancer, heart disease, diabetes, multiple sclerosis, diabetes [sic], Attention Deficit Disorder ("ADD"), and acid reflux disease" in violation of the preliminary injunction which enjoined him from making representations either expressly or implicitly that any product can "prevent, treat, or cure any disease unless at the time the representation is made, he relied upon reasonable and competent scientific evidence. *Id.* at 6. Trudeau responded by saying "[b]ecause the . . . Whistleblower infomercial was for a book, and was not used as vehicle . . . to sell Coral Calcium or any other product, it is fully protected by the Preliminary Injunction's carve-out for Mr. Trudeau's First Amendment rights." *Id.* at 8-9. Also, a very messy analysis intertwining commercial speech and the Mirror Image Doctrine first emerged in Trudeau's Response Brief. [author should elaborate on this analysis] Response of Defendant Kevin Trudeau & Third-Party Trustar Marketing Corp. to Motion for Civil Contempt for Violating the Preliminary Injunction at 8-9, FTC v. Trudeau, No. 98 Civ. 0168, 2004 WL 3722530 (N.D. Ill. 2004) (No. 03-3904). After Trudeau's June 29, 2004 response, this argument is dropped from both sides and does not seem to factor into the court's contempt holding.

⁵⁹ Supplemental Memorandum in Support of Plaintiff's Motion to Find Defendant Kevin Trudeau & Third Party Trustar Marketing Corp. in Civil Contempt for Violating the Preliminary Injunction, FTC v. Trudeau, No. 98 Civ. 0168, 2004 WL 3722527 (N.D. Ill. June 29, 2004); Press Release, Kevin Trudeau Banned, *supra* note 54.

preliminary injunction through the dissemination of the letter and ordered him to cease all marketing for Coral Calcium products.⁶⁰

With one contempt violation under his belt, Trudeau's case continued for a mere six months before it settled out of court. Trudeau agreed to pay two million dollars in consumer redress⁶¹ and was banned from "appearing in, producing, or disseminating future infomercials that advertise any type of product, service, or program to the public, except for truthful infomercials for informational publications."⁶² The FTC hailed this broad ban as a victory, but for Trudeau, the agreement would prove to be his ace in the hole.

D. The Press Release and Following Actions

As is custom after settlement, the FTC issued a press release on September 7, 2004 which was posted on its website to inform the public about the status of the suit against Trudeau individually.⁶³ In bold type across the top of the article the headline read: "Kevin Trudeau Banned from Infomercials."⁶⁴ Under the bold headline, a slightly smaller yet larger than the text of the press release and still bolded sub-headline read: "Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape."⁶⁵ The text of the press release described the terms of the settlement and the FTC's claims against Trudeau.⁶⁶ Additionally, Lydia Parnes, Acting Director of the FTC's Bureau of Consumer Protection, was quoted saying "[t]his ban is meant to shut down an infomercial empire that has misled American con-

⁶⁰ Press Release, Kevin Trudeau Banned, *supra* note 54.

⁶¹ Trudeau paid \$500,000 in cash and transferred his residential property in Ojai, California and his 2003 Mercedes Benz SL55/6 to pay the total two million dollar settlement. Also, a twenty million dollar avalanche clause was included and would be used if Trudeau misrepresented the state of his monetary affairs. Press Release, Kevin Trudeau Banned, *supra* note 54.

⁶² *Id.* Additionally, Trudeau could not "make disease or health benefits claims for any type of product, service, or program in any advertising, including print, radio, Internet, television, and direct mail solicitations, regardless of the format and duration." *Id.*

⁶³ Press Release, Kevin Trudeau Banned, *supra* note 54.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *supra* notes 61-62 and accompanying text.

sumers for years' . . . 'Other habitual false advertisers should take a lesson; mend your ways or face serious consequences.'⁶⁷ Towards the bottom of the press release, under the bolded heading "note," the following appeared "[t]his stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation."⁶⁸

To counter the FTC, Trudeau answered the press release with two lawsuits, *Trudeau v. FTC*⁶⁹ and *Trudeau v. United States*⁷⁰ after first requesting the FTC to withdraw the press release.⁷¹

In *Trudeau v. United States*, Trudeau alleged "that the press release indicated that the district court had found him liable for wrongdoing" and characterized him as a "habitual false advertiser" in the eyes of the public.⁷² This claim was ultimately dismissed for lack of subject matter jurisdiction.⁷³

In *Trudeau v. FTC*, Trudeau, who is Mr. Misleading, alleged that the FTC's press release was "false and misleading,

⁶⁷ Press Release, Kevin Trudeau Banned, *supra* note 54.

⁶⁸ *Id.* Also, the Stipulated Preliminary Injunction said:

Defendants . . . expressly deny any wrongdoing or liability for any of the matters alleged in the Complaint and the civil contempt action. There have been no findings or admissions of wrongdoing or liability by the Defendants . . . other than the finding against Kevin Trudeau for contempt of Part I of the Stipulated Preliminary Injunction, entered by the Court on June 29, 2004.

Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief as to Defendants Kevin Trudeau, Shop America (USA), LLC, Shop America Marketing Group, LLC, Trustar Global Media, Limited and Relief Defendants K.T. Corp, Limited, and Trucom, LLC at 3, *FTC v. Trudeau*, No. 98 Civ. 0168 (N.D. Ill. 2004) (No. 03-3904), available at <http://www.ftc.gov/os/caselist/0323064/040907/stip0323064.pdf>. (Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief as to Defendants Kevin Trudeau, Shop America (USA), LLC, Shop America Marketing Group, LLC, Trustar Global Media, Limited and Relief Defendants K.T. Corp. Limited, and Trucom, LLC).

⁶⁹ 456 F.3d 178 (D.C. Cir. 2006).

⁷⁰ 68 Fed. Cl. 121 (2005).

⁷¹ *Id.* at 125. The request was made on February 16, 2005; the FTC denied Trudeau's request on February 22, 2005, and the Federal Claims Court lawsuit was filed on February 28, 2005. *Id.* at 125-26.

⁷² *Id.*

⁷³ *Id.* at 131. Trudeau sought to characterize the Stipulated Order as a contract. *Id.* at 126. The court found that the government was acting in its sovereign capacity; however, "the purported contract between Mr. Trudeau and the United States [did] not 'clearly and unmistakably' provide that the United States [was] liable for monetary damages in the event of breach." *Id.* at 130-31.

and that in issuing it, the FTC exceeded its statutory authority and violated his First Amendment rights.”⁷⁴ Touché Trudeau. The false and misleading argument Trudeau raised argued that the 2004 Final Order “[1] falsely state[ed] that Trudeau had been banned entirely from infomercials, [2] erroneously impl[ied] that the settlement was a judicial finding that Trudeau was a habitual false advertiser, [3] falsely impl[ied] that the \$2 million was a fine, and [4] conspicuously omit[ted] that fact that there [had] been no finding of false advertising.”⁷⁵

The court found that there was jurisdiction⁷⁶; however, Trudeau’s complaint was legally insufficient in that it stated no claim upon which relief could be granted.⁷⁷ The court reviewed each one of the four arguments above and struck them down in turn. First, the word “ban” did not mislead a reader into thinking that the settlement was a total ban because of the inclusion of “except for truthful infomercials for informational publications.”⁷⁸ Second, the quote from the Acting Director Parnes could not lead a reasonable reader to the conclusion that the court found Trudeau to be a false advertiser because of the context of the quote as well as the note at the bottom of the press release.⁷⁹ Third, nowhere were the two million dollars characterized as a fine, and the press release made it clear that the fund was part of a voluntary settlement.⁸⁰ Finally, the press release was not misleading because it did not state that there had been “no findings or admissions of wrongdoing or liability with respect to Trudeau;” the link to the Final Order was just one mouse click away and readily available for the public to view and compare.⁸¹ Therefore, in agreement with the district court, the appellate court found “that ‘the differences between the press release and the stipulated order [were] minor and illusory.’”⁸²

⁷⁴ *Trudeau v. FTC*, 456 F.3d 178, 180 (D.C. Cir. 2006).

⁷⁵ *Id.* at 194 (alterations in original).

⁷⁶ *Id.* at 187.

⁷⁷ *Id.* at 191 (quoting Press Release, Kevin Trudeau Banned, *supra* note 53).

⁷⁸ *Id.* at 194-95.

⁷⁹ *Id.* at 195-96.

⁸⁰ *Id.* at 196.

⁸¹ *Id.* at 196-97.

⁸² *Id.* at 197 (quoting *Trudeau v. FTC*, 384 F. Supp. 2d 281, 296 (D.D.C. 2005)).

III. THE BOOKS

Trudeau's most controversial two books are *Natural Cures "They" Don't Want You to Know About* and *The Weight Loss Cure "They" Don't Want You to Know About*; each book has been the center of litigation almost as soon as they were advertised.⁸³

Natural Cures was published in 2004 by Trudeau's own publishing company. Debuting his theory that drug companies, doctors and the government want to keep Americans sick, Trudeau explained that you catch an illness because you have too many toxins in your body, and the most toxic things one can ingest are prescription and nonprescription drugs.⁸⁴ Later Trudeau "exposes" the food industry that, he alleges, is putting "secret poisonous chemicals" into America's food.⁸⁵ Why, a shocked reader may ask? Well, "it's all about the money."⁸⁶ Perhaps that is Trudeau's personal motto, and he is just confused, but back to the book.

Trudeau explains how to never get sick again. For example, if someone never wants to be sick again he should take out all metal dental work,⁸⁷ get fifteen colonics in thirty days,⁸⁸ not eat any food produced by or sold by a publicly traded corporation or anything that is a brand name product,⁸⁹ not eat anything that comes out of a microwave oven,⁹⁰ and follow the 121 other requirements listed by Trudeau.⁹¹ In his Frequently Asked Questions chapter, Trudeau answers the question of what to do if a doctor advises surgery by encouraging the reader to "stop going to medical doctors who prescribe drugs and surgery."⁹² Later he adds, "I believe that any person who says that you 'need' drugs

⁸³ NATURAL CURES, *supra* note 1; WEIGHT LOSS CURES, *supra* note 1.

⁸⁴ NATURAL CURES, *supra* note 1, at 73.

⁸⁵ *Id.* at 86.

⁸⁶ *Id.* at 85.

⁸⁷ *Id.* at 143.

⁸⁸ *Id.* at 135.

⁸⁹ *Id.* at 142 (explaining that over fifteen thousand chemicals are put into foods and are not required to be on the label and that the food industry has lobbied Congress for the right to put low fat, fat free, sugar free, light, etc. on almost anything).

⁹⁰ *Id.* at 145 (explaining that "[e]ating microwaved food on a regular basis . . . weakens your immune system and causes depression and anxiety" and baby formula is poison).

⁹¹ *See id.* at 115-78.

⁹² *Id.* at 294.

and surgery is misinformed, unknowledgeable about natural methods, or simply trying to make money off of you.”⁹³ Where are all of the natural cures amidst the ranting about drug and food companies and toxins? Out of the 522 total pages, one chapter which is comprised of a mere seventeen pages is dedicated to combating specific illnesses with natural remedies.⁹⁴

When asked for the proof of the natural cures, Trudeau says his studies are unpublished, or he does not believe in studies, or the studies are in the book, but none can ever be found.⁹⁵ They were never there.

In 2005, Trudeau spent over twenty million dollars buying over two thousand minutes of air time for his infomercials for his *Natural Cures* book which has been called ten percent common sense and ninety percent quackery.⁹⁶ Additionally the book refers the reader to a website⁹⁷ where the reader may purchase a membership to view more natural cures.⁹⁸ A follow up book, *More Natural “Cures” Revealed: Previously Censored Brand Name Products That Cure Disease*, was released in 2006 following backlash that his *Natural Cures* book did not contain cures.⁹⁹

His second published controversial book, which some may say is the most controversial, is the *Weight Loss Cure*. It was

⁹³ *Id.*

⁹⁴ *See id.* at 341-58.

⁹⁵ Copeland, *supra* note 7; John Stossell, Glen Rupel & Frank Mastropolo, *King Con -- Selling Questionable Cures? Bestselling Author Selling Questionable Cures to the Desperate and Gullible*, ABC NEWS 20/20, Jan. 20, 2006, <http://abcnews.go.com/2020/Health/story?id=1527774> (discussing the University of Calgary study that found a fictitious cure for diabetes).

⁹⁶ Stossell, Rupel, & Mastropolo, *supra* note 95.

⁹⁷ The website is www.naturalcures.com.

⁹⁸ Stossell, Rupel, & Mastropolo, *supra* note 95. The memberships are \$9.95 for a month or \$499 for a lifetime. *Id.*

⁹⁹ KEVIN TRUDEAU, *MORE NATURAL “CURES” REVEALED: PREVIOUSLY CENSORED BRAND NAME PRODUCTS THAT CURE DISEASE* (2006); *See generally* Trudeau v. New York State Consumer Protection Board, Civ. No. 1:05-CV-1019, 2006 WL 1229018 (N.D.N.Y. 2006). The CPB sent out a press release accusing Trudeau of fraud after two complaints about the book were made, so Trudeau obtained an injunction and sent a corrective letter. *Id.* at 3. The suit was later dismissed on grounds of Eleventh Amendment immunity. *Id.* Trudeau was later awarded over one hundred thousand dollars in attorney’s fees. Trudeau v. Bockstein, No. 05-cv-1019, 2008 WL 3413903 (N.D.N.Y. 2008).

published in 2007 by, again, Trudeau's publishing company.¹⁰⁰ In the book, Trudeau describes a four-phase, multi-month plan originally derived from British Endocrinologist Dr. A.T.W. Simeons in the 1950's.¹⁰¹ Before launching into the cure on page seventy three of the book, Trudeau lists thirty-one reasons why people became overweight, but Trudeau says that people continue to be overweight because of an abnormal hypothalamus gland.¹⁰² His diet plan, he alleges, will reset the hypothalamus and cause a person to never gain the weight back no matter what they eat.¹⁰³ However, there are many caveats. Phase one is optional; however, Trudeau implies that for optimum success one must follow phase one, which calls for fifteen colonics in thirty days, strict eating requirements, taking Coral Calcium, and avoiding the microwave, just to name a few from his list of sixty requirements.¹⁰⁴ Getting flustered? Remember this is only phase one. He says the "list may seem overwhelming. Certainly the average person may find it difficult to do everything on this list for the entire thirty-day Phase 1 period."¹⁰⁵ In phase two, the dieter adds to the phase one regiment injections of hCG, human chorionic gonadotrophin.¹⁰⁶ The hormone, hCG, is available in the United States by prescription only and is not approved by the FDA for weight loss.¹⁰⁷ Trudeau suggests a clever way around this pesky little problem: go to Europe, have a doctor there write you a prescription, stock up on hCG, and transport it back to the America.¹⁰⁸ Additionally the dieter may eat

¹⁰⁰ KEVIN TRUDEAU, THE WEIGHT LOSS CURE "THEY" DON'T WANT YOU TO KNOW ABOUT (2007).

¹⁰¹ Kevin Trudeau, *supra* note 2.

¹⁰² See WEIGHT LOSS CURE, *supra* note 1, at 17-26 (listing genetics, lack of walking, lack of sleep, hormonal imbalances, cold water drinks and a list of other things as reasons for obesity). The hypothalamus is a part of the brain that controls body temperature, hunger, thirst and other functions. Hypothalamus, <http://en.wikipedia.org/wiki/Hypothalamus> (last visited Nov. 18, 2009).

¹⁰³ Press Release, Federal Trade Commission, FTC: Marketer Kevin Trudeau Violated Prior Court Order: Charges Him with Misrepresenting Contents of Book (Sept. 14, 2007) (on file with author), available at <http://www.ftc.gov/opa/2007/09/trudeau.shtm>.

¹⁰⁴ MORE NATURAL CURES, *supra* note 1, at 76-92.

¹⁰⁵ *Id.* at 91.

¹⁰⁶ *Id.* at 93.

¹⁰⁷ *Id.* at 116.

¹⁰⁸ *Id.* at 116-17.

only five hundred calories a day for the twenty-one to forty-five days of phase two.¹⁰⁹ Phase three lasts for twenty-one days, and “you are allowed to eat as much food and any type of food you choose” with a few minor exceptions: no sugar, no starch, no artificial sweeteners, no fast food, no nitrates, no trans fat, no ice cold drinks, and the list goes on.¹¹⁰ Phases two and three must be followed “exactly as described.”¹¹¹ Finally, phase four is the rest of the dieter’s life.¹¹² “The simplest rule to follow is to eat anything you want, as much as you want, as often as you want. The only caveat is only eat 100% organic food.”¹¹³

Trudeau’s extensive and exhaustive weight loss plan is made even more troubling by the fact that none of the restrictions were described in his infomercials promoting the book. He said “it’s easy to do, you can do it at home.”¹¹⁴ He must have forgotten about the colonics that must be done with a doctor’s supervision or the hCG injections that are not available in the United States. He also said “[a]nd when you’re done with the protocol, eat whatever you want and you don’t gain the weight back. No restrictions now.”¹¹⁵ He never mentioned the 100% organic part.

IV. THE MAIN EVENT

The FTC perked up once again when Trudeau touted his *Weight Loss Cure* book on late night infomercials. In 2007, the FTC charged Trudeau with “violating a court order by allegedly misrepresenting the contents of his book, *The Weight Loss Cure “They” Don’t Want You to Know About*, in several infomercials.”¹¹⁶ Trudeau’s response was classic conspiracy theorist. Now, Trudeau was even more outspoken and paranoid saying that the federal government wanted to suppress the free flow of

¹⁰⁹ *Id.* at 96.

¹¹⁰ *Id.* at 99-105.

¹¹¹ *Id.* at 117.

¹¹² *Id.* at 105.

¹¹³ *Id.* at 106.

¹¹⁴ Press Release, Marketer Kevin Trudeau, *supra* note 103.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

information and does this through intimidation.¹¹⁷ But the federal government in the broadest sense was not his true target. He spoke against his arch nemesis, the FTC, by claiming that the FTC was attacking authors because they do not like what you have to say in your book, or the FTC protects the profits of companies that contribute money to campaigns, or the FTC was trying to deny his First Amendment rights.¹¹⁸ Both the FTC and Trudeau were primed for another legal knockabout.

A. Contempt in 2007

In *FTC v. Trudeau*,¹¹⁹ the FTC charged Trudeau with violating the 2004 order that banned Trudeau from using infomercials to sell any product, service, or program with the narrow exception for books and other publications.¹²⁰ In the 2004 order, Trudeau agreed to not misrepresent the content of the book, but the FTC charged that the order was blatantly violated through his infomercial for the *Weight Loss Cure* book.¹²¹

The FTC sought a third finding of contempt¹²² for the infomercial guru whose *Weight Loss Cure* infomercial was one of the top ten most frequently broadcast infomercials in February, March and July 2007.¹²³

Trudeau attempted to turn the FTC's charges into "an unprecedented legal assault on advertising for a book"¹²⁴ He

¹¹⁷ Interview with Kevin Trudeau, *supra* note 30.

¹¹⁸ *Id.*

¹¹⁹ 567 F. Supp. 2d 1016 (N.D. Ill. 2007).

¹²⁰ Press Release, Marketer Kevin Trudeau, *supra* note 103; Plaintiff's Brief Supporting its Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt, *FTC v. Trudeau* 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

¹²¹ Press Release, Marketer Kevin Trudeau, *supra* note 103, *see also supra* notes 111-12 and accompanying text. (discussing what the FTC alleged were misrepresentations); Press Release, Federal Trade Commission, Kevin Trudeau Banned From Infomercial for Three Years, Ordered to Pay More Than \$5 Million for False Claims About Weight-Loss Book, (October 6, 2008), *available at* <http://www.ftc.gov/opa/2008/10/trudeau.shtm>.

¹²² Plaintiff's Brief Supporting its Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt at 2 & n.3, *FTC v. Trudeau*, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

¹²³ *Id.* at 5.

¹²⁴ Preliminary Response of Defendant Kevin Trudeau to Plaintiff's Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, *FTC v. Trudeau*, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 1:03CV03904).

argued first that the infomercials and books were not misleading because “[t]he terms ‘easy,’ ‘easiest,’ ‘easier’ and ‘easily’ or their synonyms appear at least 31 times in the book”¹²⁵ He also argued that the FTC should not have charged him with any wrongdoing because he adhered to the Mirror Image Doctrine.¹²⁶ Finally, Trudeau argued that the statements were mere puffery on which “no charge of misrepresentation can be based.”¹²⁷ He relied on *Carlay Company v. FTC*, where the court found a diet that was advertised as easy to be not misleading.¹²⁸ Finally, Trudeau added “no reader, particularly of a ‘how-to’ book, expects a book advertisement to ‘give away’ the content of a book to the point where there is nothing left to learn by buying the book.”¹²⁹

Judge Robert W. Gettleman speaking for the Northern District of Illinois agreed with the FTC in that the court ordered Trudeau not to represent the content of the book, and the word content does not refer to “a few cherry picked phrases.”¹³⁰ “It refers to the book as a whole, and in this court’s opinion, the protocol described in the Weight Loss Book [sic] as a whole is

¹²⁵ Response of Defendant Kevin Trudeau to Plaintiff’s Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, *FTC v. Trudeau*, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

¹²⁶ See *supra* part II(a). Trudeau’s argument for adherence to the Mirror Image Doctrine later merges with a commercial speech intertwining argument that will be discussed in detail in part V(a). See *infra* part V(a).

¹²⁷ Response of Defendant Kevin Trudeau to Plaintiff’s Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, *FTC v. Trudeau*, 567 F. Supp. 2d 1016 (N.D. Ill. 2007) (No. 03-C-3904).

¹²⁸ 153 F.2d 493 (7th Cir. 1946) (discussing a diet involving eating one piece of caramel candy to curve a dieter’s appetite before a meal).

¹²⁹ Response of Defendant Kevin Trudeau to Plaintiff’s Motion for Defendant Trudeau to Show Cause Why he Should not be Held in Contempt for Violating the 2004 Permanent Injunction, *supra* note 126, at 12.

¹³⁰ *FTC v. Trudeau*, 567 F. Supp. 2d 1016, 1022 (N.D. Ill. 2007). Judge Gettleman is described as a pro defendant judge, and one who is suspicious of the government, but his fury with Trudeau is felt in his opinion. Interview with David O’Toole, FTC Local Counsel, Chicago, Ill. (Oct. 27, 2009). Judge Gettleman took a stab at Trudeau saying “[h]ow Mr. Trudeau was able to eat a ‘big’ portion of prime rib ‘marbled with fat’ and a ‘big hot fudge sundae with real ice cream, real hot fudge, real nuts and real whipped cream’ and still follow Phase 4 of his own protocol remains a mystery.” *Trudeau*, 567 F. Supp. 2d at 1023.

anything but ‘easy’ under any definition.”¹³¹ Thus Trudeau, who “misled thousands of consumers,”¹³² was held in contempt.¹³³

B. Supplemental Order in 2008

The Court described a very distasteful Trudeau and defended its 2007 decision by saying:

Given Mr. Trudeau’s history of deception and contemptuous violation of court orders, his apparent disrespect for the authority of the court and the purpose of the laws for which these orders were entered, and his willful efforts to deceive consumers into believing that his books, particularly the Weight Loss Book, [sic] contained material that they do not contain, the court confirms its finding that Mr. Trudeau is in contempt of the 2004 Injunction.¹³⁴

Thus in August 2008, the court ordered Trudeau to pay five million one hundred and seventy three thousand dollars in consumer redress. The sum was derived from a “conservative estimate of the royalties Trudeau realized from the sale of the Weight Loss Book [sic] through the offending infomercials.”¹³⁵ Trudeau plead poverty, but to no avail.¹³⁶ Also, because “Mr. Trudeau has made abundantly clear that nothing short of a complete ban, for a reasonable period of time, will achieve com-

¹³¹ *Trudeau*, 567 F. Supp. 2d at 1022.

¹³² Press Release, Federal Trade Commission, Federal Court Finds Kevin Trudeau in Civil Contempt (Nov. 21, 2007), available at <http://www2.ftc.gov/opa/2007/11/kt.shtm>.

¹³³ *Trudeau*, 567 F. Supp. 2d at 1023.

¹³⁴ *FTC v. Trudeau*, 572 F. Supp. 2d 919, 924 (N.D. Ill. 2008).

¹³⁵ *Id.* at 926. The FTC sought either \$46 million to reimburse all purchasers of the book the full purchase price along with shipping and handling, or \$6.75 million to disgorge Trudeau of his profits and an additional \$10 million dollar performance bond be put in place. *Id.* at 924-25.

¹³⁶ *Id.* at 925. Trudeau presented the court with a balance sheet that was kept by his tax consultant who did not keep the balance sheet in the ordinary course of business and placed only what Trudeau directed him to on the sheet. *Id.* Trudeau’s counsel, Jenner and Block, a prominent First Amendment firm from Chicago, Illinois, had also requested to withdraw as counsel. Amended Memorandum of Support of Defendant Kevin Trudeau’s Motion for Stay of Judgment Pending Appeal, *FTC v. Trudeau*, No. 103CV03904, 2008 WL 4273604 (N.D. Ill. Aug. 21, 2008). Additionally, Trudeau had “sold” his assets to ITV Global for one hundred and twenty-one million dollars to be paid at the rate of one million per month. ITV had not held up the contract, but Trudeau took no action to enforce the contract. Therefore, the court looked upon his poverty plea with great skepticism. *Trudeau*, 572 F. Supp. 2d at 925.

pliance with the court's previous directives to limit the content of his infomercials to non-misleading claims about his books," the court placed a total ban on all infomercials for three years.¹³⁷

After the court's decision, Trudeau requested the court stay its judgment pending an appeal and plead that the monetary judgment would force him into bankruptcy and that the three year ban was a prior restraint on his speech.¹³⁸ However, the FTC moved the court to amend its judgment to correct a mathematical error,¹³⁹ to clarify potential ambiguities regarding prohibited conduct,¹⁴⁰ and to extend the time periods associated with compliance-monitoring provisions already in place.¹⁴¹ The court's frustration with Trudeau could be felt in the Supplemental Order and Judgment from November 4, 2008. There the monetary award was determined to be a civil contempt sanction, but the court did not clarify whether the award was coercive or compensatory or exactly how the money would be used.¹⁴² The court also justified the three year injunction by noting that "Mr. Trudeau has proven himself incapable of respecting this court's narrowly tailored injunctions. The broader ban mandated by this Supplemental Order is therefore warranted."¹⁴³ With no explanation for the increase in monetary penalty, the court entered a new judgment of \$37,616,161 in favor of the FTC.¹⁴⁴ An-

¹³⁷ *Trudeau*, 572 F. Supp. 2d at 925.

¹³⁸ Memorandum of Support of Defendant Kevin Trudeau's Motion for Stay of Judgment Pending Appeal, *FTC v. Trudeau*, No. 103CV03904, 2008 WL 4273604 (N.D. Ill. Aug. 20, 2008). Trudeau's prior restraint argument, though unsuccessful here, proved to be a winning argument on appeal. He argued that the three year ban stifled his commercial speech whether it was misleading or not. *Id.*

¹³⁹ The FTC alleged that the true calculation of royalties was \$5.3 million not \$5.1 million dollars because the court did not factor December 2007 royalties into the calculation. Plaintiff's Memorandum in Support of Its Motion to Clarify and Amend the Judgment Entered Against Defendant Kevin Trudeau on August 7, 2008, *FTC v. Trudeau*, No. 103CV03904, 2008 WL 4273605 (N.D. Ill. Aug. 21, 2008).

¹⁴⁰ The FTC did not know if the permanent restrictions of the 2004 Order continued with the 2008 judgment. *Id.*

¹⁴¹ Finally, the FTC wanted the compliance monitoring from the 2004 Order to continue and be extended by the 2008 judgment. *Id.*

¹⁴² Supplemental Order and Judgment at 2, *FTC v. Trudeau*, 572 F. Supp. 2d 919 (N.D. Ill. Nov. 4, 2008).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 4. Additionally, the court said "[t]he 2004 injunction remains in full force and effect." *Id.*

gry consumers, the FTC, and anyone with a conscious could not rejoice just yet. The 2008 decision, though meant to send a powerful message, was filled with gaping holes. The holes were large enough for Trudeau to climb through to escape the judgment on appeal.

C. Appeal in 2009

Fresh from pleading poverty in 2008, Trudeau responded to the new \$37.6 million dollar judgment by bragging “\$37.6 million will not break me or change my lifestyle To enforce this ban [they] will have to sue me again.”¹⁴⁵ But the FTC did not sue again, Trudeau appealed the 2008 judgment.

With new representation¹⁴⁶ and a familiar disregard for legal authority, Trudeau appealed to the Seventh Circuit Court of Appeals. The court held that Trudeau was in contempt for violating the 2004 order to not misrepresent the content of his book and rehashed the district court’s analysis.¹⁴⁷ However, that is where the agreement with the district court ended. The court remanded the monetary sanctions back to the district court for an explanation of its calculations and administration of the award after finding that the penalty was neither coercive nor compensatory.¹⁴⁸ In lifting the three year ban,¹⁴⁹ the court

¹⁴⁵ Interview by Alex Jones with Kevin Trudeau, *supra* note 30. Trudeau bragged that he had companies in sixty countries around the world, so freezing his U.S. assets would not do a thing. *Id.* The preceding comments were made before the Seventh Circuit Court of Appeals reversed and remanded the Northern District of Illinois’ 2008 judgment, so the three year ban was still in place when Trudeau conducted the Alex Jones interview. During the interview Trudeau joked about giving the interview was really a violation of the law. *Id.*

¹⁴⁶ Kimball R. Anderson with Winston & Strawn, LLP from Chicago, Illinois, now represents Trudeau. See Brief and Required Short Appendix for Defendant - Appellant Kevin Trudeau, *FTC v. Trudeau*, 579 F.3d 754 (7th Cir. 2009) (No. 08-4249). Anderson has been called one of the most expensive attorneys in Chicago. Interview with David O’Toole, *supra* note 130.

¹⁴⁷ *FTC v. Trudeau*, 579 F.3d 754, 757-60 (7th Cir. 2009).

¹⁴⁸ *Id.* at *12-17. The court concluded that the monetary award could not be purged, so it was not coercive. *Id.* at *13. So it must be compensatory, but even if this was the court’s intent, the court did not explain how it reached the number and did not explain how the sanction would be administered. *Id.*

¹⁴⁹ *Id.* at *18-21. The overbreadth analysis does not apply to commercial speech in that a restriction may limit too much commercial speech. However, when the restriction restrains noncommercial speech as well as commercial speech, the restriction is too broad. Trudeau argued that the ban was more extensive than necessary because it re-

reasoned that the ban was not a civil penalty as it was neither coercive nor compensatory, and the court rejected the FTC's contention that the ban was simply a modification of the 2004 Order because Trudeau was given no notice of any modification.¹⁵⁰ Even though the 2009 Seventh Circuit Court of Appeals opinion could be seen as a large victory for Trudeau, the court's frustration with Trudeau was felt in dicta:

The district court is in a better position to fashion an appropriate coercive remedy, should it choose to do so on remand. The court could also, of course, choose to impose a criminal sanction instead, or the district court could modify the Consent Order, on motion from the FTC or on its own motion, provided it give Trudeau sufficient notice and opportunity to be heard on the matter.¹⁵¹

On remand, David O'Toole, who represents the FTC in Chicago, said that the FTC will file new motions asking for a bond; however, with Trudeau pleading poverty and claiming no interest in the things he sells, O'Toole is troubled that this may not work.¹⁵² Trudeau's pompous attitude toward authority suggests that perhaps nothing will.

V. CATCH ME IF YOU CAN: PAST AND FUTURE METHODS

With *FTC v. Trudeau* headed back to the district court, Trudeau may have won yet another battle, but will this slick

stricted his commercial and noncommercial speech as well as misleading and truthful speech. Additionally, Trudeau argued that the restriction failed the narrow tailoring prong of *Central Hudson*. Brief and Required Short Appendix for Defendant - Appellant Kevin Trudeau, *supra* note 146.

¹⁵⁰ *Id.* The ban was "clearly not compensatory." *Id.* But "[t]o the extent that 'a sanction operated whether or not a party remains in violation of the court order, it obviously does not coerce any compliance.'" *Id.* (quoting *Harris v. City of Philadelphia*, 47 F.3d 1311, 1329 (3d. Cir. 1995)). The FTC could have modified the 2004 Order if the court would have granted a motion to modify, but no such motion was ever presented much less granted. *Id.* at *20.

¹⁵¹ *FTC v. Trudeau*, 579 F.3d 754, 779 (7th Cir. 2009).

¹⁵² Interview with David O'Toole, *supra* note 130. In February 2010, Trudeau was sentenced to thirty days in jail for contempt of court because he "persuaded visitors to his website to help him launch an e-attack" that "hopelessly clogged" Judge Gettleman's computer. In addition, Trudeau was ordered to surrender his passport and post a \$50,000 bond. Lila Shapiro, *Kevin Trudeau Sentenced: infomercial King to Jail for Contempt of Court*, HUFFINGTON POST, Feb. 17, 2010, http://www.huffingtonpost.com/2010/02/17/kevin-trudeau-sentenced-i_n_466173.html.

sleaze-ball win the war? I would argue, yes. There is no legal doctrine that can stick to him.

The FTC has attempted holding Trudeau in contempt for violating past settlements or court orders, has issued more injunctions against him, and fined him for millions of dollars. But nothing is stopping Trudeau from misleading the nation through his infomercials and books. The following section analyzes some legal doctrines or theories that could be used to punish Trudeau, but I believe all will ultimately fail.

A. Commercial Speech

Commercial speech is “speech that does ‘no more than propose a commercial transaction.’”¹⁵³ To determine if speech is commercial speech, *Blogger v. Youngs Drug Products Corporation* said to look for three factors: an advertisement, economic motivation, and reference to a specific product.¹⁵⁴ Such speech is afforded some degree of Constitutional protection even though it receives less protection than other forms of speech;¹⁵⁵ however, “speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.”¹⁵⁶ The test for restrictions on commercial speech comes from *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*: whether the speech is protected by the First Amendment, not misleading or unlawful; “whether the asserted governmental interest is substantial;” “whether the regulation directly advances the go-

¹⁵³ *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

¹⁵⁴ *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-68 (1983).

¹⁵⁵ See *Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 482 (1989) (discussing the financial motivation behind commercial speech that protects it from being chilled).

¹⁵⁶ *Virginia State Bd. Of Pharm.*, 425 U.S. at 771-72; *Bigelow v. Virginia*, 421 U.S. 809 (1975); “It is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996) (quoting *Riley v. Nat’l Fed’n of Blind of North Carolina*, 487 U.S. 781, 801 (1988)).

vernmental interest asserted; whether it is not more extensive than is necessary to serve that interest.”¹⁵⁷

One possibility of using commercial speech to limit Trudeau’s advertising is derived from the first prong of *Central Hudson*, the idea that there is no “constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”¹⁵⁸ However, this would seem to be what the FTC is already doing in the many court actions they have brought over the past decade.¹⁵⁹ They have tried to limit Trudeau’s advertising in the past, but Trudeau just comes back even stronger with a new scheme that somehow slips by.

A second option, that perhaps could not be used to prosecute Trudeau but rather justify his behavior, has not been directly addressed by the Supreme Court. This is the intertwining of commercial speech with a protected product, like a book.

The idea of intertwining commercial speech with protected noncommercial speech stemmed from *Riley v. National Federation of the Blind of North Carolina* where the Court said ‘we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.’¹⁶⁰ The Court tried to limit *Riley* to its facts the next year with *Board of Trustees of the State University of New York v. Fox*.¹⁶¹ Justice Scalia, in writing for the Court, attempted to distinguish *Riley* by saying that the commercial

¹⁵⁷ 447 U.S. 557, 566 (1980). However the least restrictive means are not required, but the narrow tailoring prong must be reasonable not necessarily perfect. *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999).

¹⁵⁸ *Central Hudson*, 447 U.S. at 563. To do this the FTC must argue that Trudeau’s speech in the infomercials is undeniably commercial speech because it is an advertisement (an infomercial) made with economic motivation (buy the book) which references a specific product (the book). See *Bolger*, 463 U.S. at 66-68.

The final factor may be slightly more difficult to meet because generally books, meaning the ideas contained therein, are not considered to be products. However, Trudeau is not just selling the ideas in the books, but he is selling the literal book: binding, dust jacket, pages and all, so the book could be a product.

¹⁵⁹ See *supra* notes 33-37 and accompanying text.

¹⁶⁰ *Riley v. Nat’l Fed’n of the Blind of North Carolina*, 487 U.S. 781, 796 (1988) (discussing speech intertwined with charitable solicitations).

¹⁶¹ 492 U.S. 469 (1989).

speech “*was* ‘inextricably intertwined’ because the state law *required* it to be included.”¹⁶² He clarified his point by saying “[w]e have made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”¹⁶³

The intertwining argument seems to be fully settled, yet Trudeau hangs his hat on the *Riley* analysis.¹⁶⁴ Additionally, lower courts are split on when commercial speech intertwines with noncommercial speech and when it does not, especially if the commercial speech is an advertisement for the protected speech of a book. However, no lower court has analyzed intertwining commercial speech in the context of false or misleading commercial speech.¹⁶⁵

*Lacoff v. Buena Vista Publishing, Incorporated*¹⁶⁶ and *Keimer v. Buena Vista Publishing, Incorporated*¹⁶⁷ reach different conclusions on the nature of advertisements for books that arguably could be intertwined with the book. *Lacoff* said that advertisements on the flyleaf of a book are part of the book and not separate advertisements; therefore, the advertisements are fully

¹⁶² *Id.* at 474 (emphasis in the original). “*Riley* involved a state-law requirement that in conducting fundraising for charitable organizations (which we have held to be fully protected speech) professional fundraisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities.” *Id.*

¹⁶³ *Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989) (quoting *Central Hudson*, 447 U.S. at 563). Scalia really lets his hair down when he says “[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.” *Id.* at 474.

¹⁶⁴ Brief and Required Short Appendix for Defendant - Appellant Kevin Trudeau, *supra* note 146. Trudeau discussed and relied on *Riley* as well as *Lacoff v. Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183 (Sup. Ct. 2000).

¹⁶⁵ *Bery v. City of New York* said that the “sale of protected materials is also protected.” But the *Bery* case involved selling artwork in public places without a vender’s license, so it is easily distinguishable from the facts of *FTC v. Trudeau*. 97 F.3d 689, 695 (2d Cir. 1996). Additionally, *Rezec v. Sonly Pictures Entertainment, Inc.* said that advertising reflecting the content of a film would be fully protected speech, but this rule applied only when the advertisements were “merely . . . adjunct[s] to the exhibition of the film[s], such as by using photographs of actors in films.” 10 Cal. Rpt. 3d 333, 339 (Ct. App. 2004) (internal citation omitted). *Rezec* is also different from *FTC v. Trudeau* because Trudeau is not using the advertisements as mere adjuncts to the books he is selling, but the advertisements are separately produced infomercials that rely on Trudeau’s character to sell a product that just happens to be a book.

¹⁶⁶ 705 N.Y.S.2d 183 (Sup. Ct. 2000).

¹⁶⁷ 75 Cal. App. 4th 1220 (Ct. App. 1999).

protected speech.¹⁶⁸ However, *Keimer* concluded that quotations from the book repeated on the book cover and flyleaf were commercial speech.¹⁶⁹ However, both *Keimer* and *Lacoff* are different from Trudeau's quite separate infomercial which should not be packaged with his books as protected speech.

One way to untangle the intertwining commercial speech mess is to simply say that infomercials and advertisements that sell books do not convey any political message but, like selling housewares in *Fox*, propose a purely commercial transaction, buy the book. Therefore, Trudeau could not use intertwining commercial speech to defend his actions.

B. What About the Book: Torts, Criminal Law and the First Amendment

If tricky Trudeau can escape the law with his advertising, could he be liable for the book itself? Courts have struck this idea down for the following reasons.

First, books are not products because their words and images are not sufficiently tangible to constitute a product.¹⁷⁰ Additionally, "imposition of products liability for a defect in the written contents of a publication would have a chilling effect on the freedoms of speech and press . . ."¹⁷¹ So, it would seem that tort liability for Trudeau would be out of the question. Case law backs up this proposition. In Florida, a man sued Atkins Nutritionals, Incorporated and the co-executor of Dr. Robert C. Atkins' estate for product liability, negligent misrepresentation and deceptive conduct.¹⁷² The court held that the ideas in the

¹⁶⁸ *Lacoff*, 705 N.Y.S.2d at 191. However, the *Lacoff* court relied on New York law which provides broader protection for speech than federal law.

¹⁶⁹ *Keimer*, 75 Cal. App. 4th at 1233 (concluding that advertising materials relating to a book are commercial speech if they consist of "advertising statements which were true, or were opinion or 'rhetorical hyperbole' and thus were not verifiably false").

¹⁷⁰ AM. L. PROD. LIAB. 3d § 119:1 (2009). The binding of a book or physical pages could be products, but actual ideas are intangibles. See *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315 (S.D.N.Y. 2006) (applying Florida law).

¹⁷¹ AM. L. PROD. LIAB. 3d § 119:3 (2009).

¹⁷² *Goran*, 464 F. Supp. 2d 315. The plaintiff alleged that after two months of following the Atkins Diet, his cholesterol level shot up and had to have an angioplasty to unclog one of his coronary arteries. *Id.*

diet book were protected by the First Amendment and thus not defective or dangerous.¹⁷³

Criminal liability has one tiny glimmer of hope in *Rice v. Paladin Enterprise, Incorporated* or the “Hit Man” case.¹⁷⁴ *Hit Man: A Technical Manual for Independent Contractors*, a how-to book professional murders, was the center of the litigation.¹⁷⁵ The First Amendment did not pose a bar to finding that the publisher was civilly liable as an aider and abettor of the murders.¹⁷⁶ However, Paladin Enterprises conceded that their intent was to cause imminent lawless action, thus opening the door for liability.¹⁷⁷ However, no other court has followed this case, so it would seem that criminal liability, like tort liability, is dead on arrival.

C. Contracts Theory

The contracts theory would target the ideas of a book that are objectively verifiable, such as how-to books or weight loss books, and give the consumer an opportunity to sue if the advertisements were not the same as the book or if the ideas in the book did not work.¹⁷⁸ This offer and acceptance idea stems from *Groden v. Random House, Incorporated* where the court observed that:

[I]t is important to distinguish between advertising statements made to summarize an argument or opinion within a book and those made about a book as a product. The former are essentially a matter of argument, to be accepted or rejected by those

¹⁷³ *Id.* (holding that the book itself was noncommercial speech and entitled to full First Amendment protection).

¹⁷⁴ *Rice v. Paladin Enterprise, Inc.*, 128 F. 3d 233 (4th Cir. 1997). *See also* *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992) (holding a publisher liable for negligence in publishing an advertisement for a hit man for hire).

¹⁷⁵ *Id.*

¹⁷⁶ This idea is presented in the context that every civil law penalty has a criminal law mirror image. For example, one could roughly equate rape in the criminal context to assault and battery in the civil context.

¹⁷⁷ *Id.* *See generally* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁷⁸ *Fentonmiller, supra* note 33, at 596-97. Fentonmiller also proposes a commercial conduct theory, but I believe this is possibly the weakest of all ideas, so it is not discussed. *See id.* at 601-610 (equating how-to books to computer source code).

who read the book, while the latter might often be statements of fact that might be verifiable.¹⁷⁹

However, the contracts argument would probably not hold water because of the strong policy argument of the slippery slope.

CONCLUSION

While the courts and FTC sit with their hands tied, Trudeau cleverly side steps all existing law by exploiting the First Amendment. Since his last bout of litigation, he has published two new books. *Debt Cures "They" Don't Want You to Know About* debuted in 2008,¹⁸⁰ and *Free Money "They" Don't Want You to Know About* arrived in 2009.¹⁸¹ For over a decade Trudeau has made a career out of fleecing America, and as detestable as his behavior may be, there is no legal doctrine that can outwit Trudeau who has truly discovered his criminal niche.

Catherine Bryant Bell

¹⁷⁹ *Id.* (emphasis omitted) (discussing *Groden v. Random House, Inc.*, 61 F.3d 1045 (2nd Cir. 1995)).

¹⁸⁰ *DEBT CURES*, *supra* note 1.

¹⁸¹ KEVIN TRUDEAU, *FREE MONEY "THEY" DON'T WANT YOU TO KNOW ABOUT* (2009).

COMMENT

IMMIGRANT TEACHERS IN HIGH-MINORITY SCHOOLS: USING IMMIGRATION LAW TO BYPASS STRICT SCRUTINY & THE COLORBLIND CONSTITUTIONALISM OF *PARENTS INVOLVED*

INTRODUCTION

We are just students trying to become lawyers, doctors, congressmen like yourself and one day president, so we can make a change to not just the state of South Carolina but also the world. We are not quitters.¹

Nestled amongst the golden tobacco fields of Dillon, South Carolina is J.V. Martin Junior High school. This “hodgepodge of decrepit, decaying and unsafe facilities” has been characterized by the paint peeling of its walls, and by the train which barrels past it six times a day drowning out the voices of the teachers within.² The world gained notice of this small South Carolina school on February 25, 2009, when President Barack Obama read part of a letter to Congress from Ty’Sheoma Bethea, a student at Martin, to draw attention to a national crisis - the education of minority schoolchildren.

Although it has been over fifty-five years since *Brown v. Board of Education*, public schools in the United States have failed at closing the racial divide in education. In many areas of previously de jure segregated states, such as South Carolina,

¹ Letter from Ty’Sheoma Bethea to Congress; see Howard Witt, *Letter From the Heart Lands Teen in First Lady’s Box for Tonight’s Speech*, CHI. TRIBUNE, Feb. 24, 2009, available at <http://www.chicagotribune.com/news/nationworld/chi-obama-school-girlfeb25,0,6067620.story>.

² Susanne M. Schafer, *Crumbling SC School Gets Mention in Obama Speech*, ASSOC. PRESS, Feb. 25, 2009 (quoting Bud Ferillo), available at <http://abcnews.go.com/us/wirestory?id=6959261>.

schools that are almost entirely white or black have become commonplace. These students often are the casualties of the battle over educational segregation that began over fifty years ago. Schools are largely more segregated now than they were in 1970, and the result has been a staggering gap in scholastic achievement, access to higher education, and graduation rates between minority students and their white counterparts.³ For the majority of these students, high levels of concentrated poverty and an absence of adequate outside resources combine to create schools with failing facilities, high student to teacher ratios, and a less qualified faculty.⁴

In the wake of the Supreme Court's recent decision in *Parents Involved*, race-conscious implementation of federal legislation seems to have become close to impossible. The Court's colorblind educational policy reinforces the current form of race subordination by ignoring the inherent contradiction between local control and educational equity.⁵ Therefore, students like

Bethea and her classmates at J.V. Martin are stuck in limbo between the interests of society in furthering their education, and the role of the Supreme Court in safeguarding the equal protection of all people. So how can this problem be fixed? First, there must be a consideration of the factors that lead to these poor educational outcomes in minority communities. Many factors exist, but one of the most prominent is the inability of certain school systems to consistently find or retain quality teachers. While what measures quality is a debatable subject, there is no debate as to whether better teachers lead to better results.⁶

³ John Brittain, et al., *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 596-97 (2008).

⁴ Judith A. Winston, *Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 NEB. L. REV. 190, 196 (2003) (discussing some of the reasons for the poor academic achievement of many rural U.S. counties and states).

⁵ See generally Luis Urrieta, Jr., *Community Identity Discourse and the Heritage Academy: Colorblind Educational Policy and White Supremacy*, 19 INT' L J. OF QUALITATIVE STUD. IN EDUC. 455 (2006).

⁶ See Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools and Academic Achievement*, 73(2) ECONOMERICA 417, 419 (2005) (noting "that having a high quality teacher throughout elementary school can substantially offset or even eliminate the disadvantage of low socioeconomic background"); see also Joseph O. Oluwole & Pres-

Many factors may contribute to the lack of quality teachers in minority communities. These communities are often some of the most socioeconomically disadvantaged communities in the United States.⁷ Blanketed in poverty, these schools often produce poorer educational outcomes than other schools.⁸ These results can be attributed to the effects of poverty on teachers, such as lower salaries and a lack of the outside infrastructure that is commonly available in wealthier communities.⁹ With the enactment of the No Child Left Behind Act (NCLB) in 2002, the demand for adequate teachers has become even greater. It provides that schools with poor test scores and schools which have an underperforming demographic are subject to greater sanctions and are more likely to incur staff changes.¹⁰ By raising the penalties associated with failing test scores, the NCLB encourages teachers to leave challenging schools for ones with higher achieving students.¹¹ Furthermore, the declining number of young professionals entering the field of teaching coupled with the mass exodus of accomplished teachers to retirement has left the pool from which these schools can hire extremely diminished.¹²

To counteract this problem, many poor and understaffed school districts have been forced to recruit heavily and offer generous hiring incentives to lure college graduates or other high-

ton C. Green, III, *No Child Left Behind Act, Race, and Parents Involved*, 5 HASTINGS RACE & POVERTY L.J. 271 (2008).

⁷ See GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARV. UNIV., REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 1 (2009).

⁸ See generally RURAL SCHOOL AND COMMUNITY TRUST, "WHY RURAL MATTERS: THE REALITIES OF RURAL EDUCATION GROWTH" i-ii (Allison Younches ed., 2007). A noticeable correlation exists between poverty and educational outcome for minorities, especially in the Southern United States. Eight of the thirteen states facing the worst socioeconomic challenges are in the Southeast and Mid-South Delta. *Id.* As a result, seven of these states are listed as one of the thirteen states with the poorest education outcomes in the United States. *Id.*

⁹ See Winston, *supra* note 4, at 206.

¹⁰ James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 972-77 (2004) (describing the effect of the No Child Left Behind Act and state accountability systems on underperforming schools' ability to retain and attract high quality teachers).

¹¹ *Id.*

¹² NATIONAL COMMISSION ON TEACHING AND AMERICA'S FUTURE (NCTAF), AMERICA'S SCHOOLS ARE ABOUT TO BE HIT BY THE LARGEST TEACHER RETIREMENT WAVE IN HISTORY: ARE WE READY? 12 (2009).

ly qualified individuals to teach in their schools.¹³ The result, however, has been "a chronic cycle of teacher hiring and replacement, [which] sap [these school districts] of precious dollars that could be better spent to improve teaching quality and student achievement."¹⁴ So how can the government provide for these poor minority communities to hire and retain quality teachers without triggering strict judicial review? The solution may be found in an unlikely source - Congress's plenary power over immigration. Although immigration law has often been criticized as the "last vestige of an antique period of American law,"¹⁵ characterized by explicitly racially discriminatory statutes, it remains one of the last areas in which race-conscious legislation may be upheld on a standard less than strict scrutiny.¹⁶ The Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens,"¹⁷ and that federal immigration statutes are "largely immune from judicial control."¹⁸ While the Court has slowly departed from its understanding that all federal immigration laws are immune from judicial review, it has maintained that its power to review is extremely limited, giving great deference to the legislature and reviewing statutes only for rationality. Using immigration law to bypass strict scrutiny, Congress could enact a statute which encourages foreign students already in the United States on F-1 visas to teach in minority rich schools by offering them the ability to adjust status to that of permanent resident upon teaching in these schools for a certain period of time.

American universities currently educate over a quarter of a million foreign students, many of whom are the best and brigh-

¹³ *Id.* at 12-13.

¹⁴ *Id.* at 13.

¹⁵ Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998).

¹⁶ See, e.g., *Unification Church v. INS*, 547 F. Supp. 623, 628 (D.D.C. 1982); *Ramos v. United States Civil Serv. Comm'n*, 376 F. Supp. 361, 366 (D.P.R. 1974), *aff'd in part*, 426 U.S. 916 (1976); *Bertrand v. Sava*, 684 F. 2d 204 (2nd Cir. 1982); *In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983).

¹⁷ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

¹⁸ *Id.* (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

test of their homeland.¹⁹ Despite many international students' desire to remain in the United States upon graduation, the difficulty of securing either permanent resident or "specialty-worker" visas forces the majority of these highly-educated students abroad.²⁰ Although race and immigration have often represented diametric opposites in the values of the United States - the contradiction epitomized by the Statue of Liberty and the institution of slavery - the combination of the allure of the golden door for immigrants and the critical need for highly educated teachers in minority communities may represent an opportunity not only to change the African-American perspective on immigration, but also provide quality education for minority students in the United States. By enacting a federal immigration statute which (a) increases the H-1B quota for foreign students at accredited American universities or colleges who hold offers of employment from under-performing, predominately minority public schools within the United States, and (b) automatically adjusts these students' status to legal permanent resident upon teaching in these schools for six continuous years, the United States may be able to both retain and attract the world's best intellectual talent while educating its underperforming minority schoolchildren.

In part one of this paper, I will discuss the plight of minority schoolchildren in America and the continuing achievement gap in education. I will also discuss some of the factors that have attributed to the general failure of U.S. schools to educate their non-white students on the same level that they educate their white students, paying special attention to teacher quality and teacher retention rates. I will further indicate how state assessment systems and the No Child Left Behind Act have had a negative impact on high-minority schools as they create additional incentives for teachers to leave challenging teaching environments for higher achieving schools. In part two, I will show

¹⁹ See Vivek Wadhwa, *America's Other Immigration Crisis*, THE AMERICAN: J. AM. ENTERPRISE INST. 1 (July-Aug 2008), available at <http://www.american.com/archive/2008/july-august-magazine-contents/america2019s-other-immigration-crisis>.

²⁰ *Id.* (retelling the story of Sanjay Mavinkurve, a prominent software designer for Google and Facebook, who despite his dream of living in America was forced to return to Singapore because of the difficulty in securing his fiancée a visa).

how using Congress's plenary power over immigration, a race-conscious statute directed at the education of minority students could be upheld, even after the Court's decision in *Parents Involved*. In part three, I will address the current status of foreign students in the United States, describe the proposed statute in detail, demonstrate how this proposed statute will work, and how it would benefit all involved, despite the racial tension between many native-born minorities and recent immigrants.

I. STUDENTS OF COLOR IN THE UNITED STATES AND THE IMPORTANCE OF QUALITY EDUCATORS

A. *The Current Status of Minority Students in a Color-Blind United States*

The official upholders of law and order in Oxford, a group of Mississippi plain-clothesmen chortle as one of their number takes practice swings with a billy and another ties on an identifying armband. They are on the campus not to put down a riot but to take part in one of the incidents which led up to it. They mobilized earlier in the week to back up Lieut. Governor Paul Johnson when he turned [James] Meredith and U.S. marshals away from the enrolling office. But when the riot broke out, all local and state cops made themselves scarce.²¹

From the above caption of a photograph taken days before the attempted integration of the University of Mississippi to the image of Governor Wallace blocking the entrance of two black students into Foster Auditorium at the University of Alabama, the legacy of the nation's resistance to the coeducation of the races has been thoroughly documented. Forty-five years later, while the stain of racism has not yet thoroughly been purged from these institutions, integration in schools of higher education has largely been achieved. But the Court's decision in *Brown* and its subsequent demand in *Brown II* was not limited to public colleges and universities, but rather extended to all forms of public education. While largely failing in their attempts

²¹ PAUL HENDRICKSON, *SONS OF MISSISSIPPI: A STORY OF RACE AND ITS LEGACY* 13 (Alfred A. Knopf 2003) (quoting the caption underneath a photograph taken by Charles Moore in Oxford, Mississippi, in September of 1962 and published in *Life* magazine).

to prevent the integration of their universities, these same communities have achieved significant success in their goal of maintaining separate classrooms for their children.

Across the United States, racial isolation and school segregation are increasing.²² Through the establishment of private schools and the rezoning of school districts, in many communities across the South, 98% black public schools and 100% white private schools have become commonplace.²³ The trend can also be found in the North, where 60% of all black students in New York attend schools that are at least 90% black.²⁴ The result of increased segregation is an ever widening achievement gap in education between white students and non-white students. For example, in 2007, the average fourth grade white student's reading score was 230, just eight points shy of "proficient", while the average score for black and Latino students, 203 and 204 respectively, were both below the 208 point mark that indicates a "basic" reading level.²⁵ The results are similar in mathematics²⁶ and science,²⁷ as well. This achievement gap also manifests itself outside the bounds of standardized testing, as minority rich schools typically have much higher dropout rates, lower graduation levels, and higher rates of suspension, expulsion, and criminal sanctions.²⁸ As Professor Sheryll D. Cashin observes, "we are not even living up to the repugnant principle

²² See Brittain, *supra* note 3, at 595-96.

²³ SAVE THE CHILDREN, AMERICA'S FORGOTTEN CHILDREN: CHILD POVERTY IN RURAL AMERICA 28 (2002).

²⁴ See Brittain, *supra* note 3, at 600.

²⁵ NATL. CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, READING 15-20 (2007) [hereinafter THE NATION'S REPORT CARD: READING].

²⁶ NATL. CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, MATHEMATICS 15-20 (2007). In 2007, fourth grade white students across the nation averaged a mathematic achievement score of 248, which was just one point shy of "proficient" and well above the 222 average of black students and the 227 average for Hispanic students. *Id.*

²⁷ NATL. CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, SCIENCE 5-10 (2005). Fourth grade white students averaged a score of 162, eight points shy of "proficient," while some minority students failed to surpass the "basic" plateau of 138 with blacks scoring 129 and Hispanics, on average, scoring 133. *Id.*

²⁸ See Brittain, *supra* note 3, at 596.

announced in *Plessy v. Ferguson*. Our schools are separate, but hardly equal.”²⁹

B. The Teacher Quality Gap

Scholars and commentators have identified a number of factors that contribute to the educational achievement gap between minority and white students, including the connection between poverty and scholastic achievement, teacher and staff turnover rates, teacher quality, class size, lower quality course offerings, and inferior facilities.³⁰ As a result, Congress enacted the No Child Left Behind Act in 2002 to address these problems and “to ensure that all children have a fair, equal, and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”³¹ To achieve this goal, the Act requires all states to create their own assessment systems that establish “challenging” academic standards through which they test students regularly, so that student achievement can be traced and accountability for schools and teachers can be strengthened. It also mandates that schools employ only “highly qualified” teachers.³² Teachers are considered “highly qualified” if they (a) are fully certified, and (b) are competent in the subjects that they teach.³³

The NCLB, however, does more than establish a bare system of standards and assessments. It also creates a system which sanctions underperforming schools and faculty.³⁴ Six years after its enactment, the evidence has revealed that the number of schools which have incurred these sanctions are disproportionately black or Latino, and high poverty schools.³⁵ Furthermore, while these sanctions were implemented to ensure

²⁹ Sheryll D. Cashin, *American Public Schools Fifty Years After Brown: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 343 (2004).

³⁰ See *id.* at 348 (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 262 (1991) (Marshall, J., dissenting)).

³¹ 20 U.S.C. §6301 (2008).

³² 20 U.S.C. §6319(a)(1).

³³ 20 U.S.C. §7801(23); see Ryan, *supra* note 10, at 939-40.

³⁴ See 20 U.S.C. §6316(b)(1)-(3)

³⁵ GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARV. UNIV., REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 4 (2009).

teacher and school accountability, they have had the negative effect of discouraging young individuals from entering the teaching profession, deterring quality teachers from teaching in challenging environments, and reducing the number of teachers in the United States.³⁶

While scholars disagree over which factor attributable to minority schools has the greatest effect on the scholastic achievement, no one denies that teachers matter.³⁷ Numerous reports document that scholastic environment, teacher ratios, and quality of teachers have more effect on students than race or class.³⁸ In the Gautreaux experiment, the result of relocating low-income black students from the poorest areas of Chicago and placing them into schools with higher quality teachers and lower teacher-student ratios was equal performance between the black students and their white peers.³⁹ However, because of the high demand for quality teachers, the majority of minority students remain in schools with less prepared educators and classmates.⁴⁰ These schools, whether in the rural South or the urban North, are often some of the most socioeconomically disadvantaged communities in the United States.⁴¹ In general, states and school districts which offer high or competitive hiring salaries have fewer problems in obtaining quality teachers than do poor states and school districts.⁴² Blanketed in poverty, these schools are stuck in a vicious cycle as their inability to offer competitive salaries to hire or retain quality teachers results in poorer educational outcomes for the students, which then manifests itself in the exodus of the remaining quality teachers to schools with affluent, white students.⁴³

³⁶ See Ryan, *supra* note 10, at 971-78.

³⁷ See Brief for 553 Social Scientists as Amici Curiae Supporting Respondents at 3, app. 31, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Parents Involved)*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915) (indicating the correlation between inexperienced teachers and poor academic performance by students).

³⁸ See Cashin, *supra* note 29, at 356 (discussing the Gautreaux experiment).

³⁹ *Id.*

⁴⁰ See ORFIELD, *supra* note 35, at 6.

⁴¹ *Id.*

⁴² See generally NATIONAL CENTER FOR EDUCATION STATISTICS, STATUS OF EDUCATION IN RURAL AMERICA 79-105 (2007).

⁴³ See Ryan, *supra* note 10, at 974. As Professor Ryan has observed:

By increasing the demand for and decreasing the supply of highly qualified teachers, the NCLB has reinforced the distinct disadvantage of minority-rich schools in obtaining adequate educators for their students. In raising the stakes attached to test scores, the NCLB encourages teachers to leave schools that will likely not make adequate yearly progress.⁴⁴ Furthermore, certain state accountability systems reward teachers with bonuses when their classes produce sufficient test scores, while threatening teachers whose students perform poorly with termination.⁴⁵ For these reasons, attaching sanctions and rewards to test results reinforces the desire of teachers to leave these predominantly minority schools for the schools that are most likely to succeed under the NCLB and state accountability systems. As has been noted, the majority of schools that have been sanctioned under the NCLB have had a nonwhite majority.⁴⁶ The declining number of minority teachers has also put predominantly minority communities at a disadvantage in adequately staffing their schools, as their white teachers tend to relocate as soon as the opportunity presents itself.⁴⁷ The result has been noticeable hiring shortages in urban, low-income, minority schools and remote rural areas, despite the overall teacher supply.⁴⁸

[S]chools with poor and minority students are more likely to perform poorly on state tests than schools with relatively affluent, white students. Poor and predominantly minority schools already struggle to attract and retain good teachers. Study after study documents that high-poverty and high minority schools have less qualified and less-experienced teachers. Empirical studies also consistently indicate that, when given the chance to chose, teachers systematically move to schools with fewer poor, minority, and low-achieving students.

Id. (internal footnotes omitted).

⁴⁴ 20 U.S.C. §1116(b)(7)-(8).

⁴⁵ See Charles T. Clotfelter & Helen F. Ladd, *Recognizing and Rewarding Success in Public Schools*, in HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION 23, 46 (Helen F. Ladd ed., 1996).

⁴⁶ See Ryan, *supra* note 10, at 974.

⁴⁷ Wendy Parker, *Desegregating Teachers*, 86 WASH. U.L. REV. 1, 33-36 (2008).

⁴⁸ *Id.*

C. Parents Involved and the Current Standard for Redressing
Scholastic Racial Disparities

In the 2007 consolidated case of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* (*Parents Involved*), the Supreme Court announced its current standard of review for race-conscious measures designed to address racial segregation in schools.⁴⁹ The plurality opinion, authored by Chief Justice Roberts, reiterated the Court's willingness to adhere strictly to colorblind constitutionalism so the Court could achieve the Fourteenth Amendment's ultimate goal of eliminating race as a factor in governmental decision making.⁵⁰ In his concurrence, Justice Kennedy, the swing vote for the majority, rejected the plurality's insistence on colorblind constitutionalism but emphasized that racial classifications are constitutionally prohibited "absent some extraordinary showing" in cases of de facto segregation.⁵¹ While Justice Kennedy's concurrence advocates certain race-conscious measures as acceptable under strict scrutiny, many of these are impractical or inefficient for most school districts, especially at the elementary and secondary school level.⁵² As a result of *Parents Involved*, schools have largely lost the ability to utilize racial distinctions in pre-university scholastic settings. With substantial evidence indicating that race-conscious measures are, if not necessary, of at least paramount importance in remedying educational disparities based on race, the Court's opinion in *Parents Involved* seems to present a mountainous hurdle for those wishing to close the achievement gap.⁵³

Parents Involved was the culmination of the Court's near half-century of work attempting to purge U.S. jurisprudence of the stain of racial bigotry left by the Supreme Court around the turn of the nineteenth century. Under the control of Chief Jus-

⁴⁹ 551 U.S. 701 (2007).

⁵⁰ *Id.* at 730 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)); see also DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 76 (6th ed. 2008).

⁵¹ *Id.* at 796 (Kennedy, J., concurring).

⁵² See BELL, *supra* note 50, at 80.

⁵³ See Oluwole & Green, *supra* note 6, at 300-01.

tice Melville Fuller, the Court entrenched categorical discrimination into American law with cases like *Plessy v. Ferguson*⁵⁴ and *Cumming v. Richmond County Board of Education*.⁵⁵ As a result, almost any classification based on race, either benign or malignant, will be reviewed with the strictest scrutiny. The Court, however, has refused to overturn a number of these Fuller Court cases which provide precedent for legal racial discrimination, e.g., *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.

II. BEYOND THE BOUNDS OF STRICT SCRUTINY – IMMIGRATION LAW

A. Race Discrimination and the Constitutional Law of Immigration: Traditionally

During the mid-nineteenth century, the allure of cheap land and gold drove a rush of people west of the Mississippi River and into California. With each passing year, as the population of the western United States continued to grow and western towns began to develop into communities, the demand for cheap labor became an issue of immediacy.⁵⁶ Congress found its answer for this labor shortage across the Pacific in a war-torn China.⁵⁷ In 1868, China and the United States entered into the Burlingame Treaty, which provided for unrestricted Chinese immigration in exchange for improved trade relations.⁵⁸ For years, thousands of Chinese immigrants flooded into the United States to work on the railroads and in the fields; however, by 1869, with the dawn of a post-Civil War depression and the completion of the tran-

⁵⁴ 163 U.S. 537 (1896).

⁵⁵ 175 U.S. 528 (1899).

⁵⁶ See FRANK F. CHUMAN, THE BAMBOO PEOPLE 3-4 (1976).

⁵⁷ *Id.*

⁵⁸ *Id.* Specifically, Article 5 of the Burlingame Treaty provides:

The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other for purposes of curiosity, of trade, or as permanent residents.

Id.

scontinental railway, the once flowering job market began to wither. The result was intense prejudices against the Chinese immigrant workforce. Aware of the animosity of the labor unions toward the Chinese immigrants building in the West, Congress enacted the Chinese Exclusion Act of 1882, which suspended all future immigration of Chinese laborers into the United States for ten years. In this turbulent environment, the Supreme Court decided two cases which have become the foundation for the plenary power doctrine: *Chae Chan Ping v. United States*⁵⁹ and *Fong Yue Ting v. United States*.⁶⁰

The Chinese Exclusion Act prohibited the immigration of Chinese laborers to the United States.⁶¹ Yet, the Act also stated immigrants of Chinese decent who had resided in the United States since 1880 had the right to leave the United States and return, provided they were issued a certificate of residence evidencing these rights.⁶² In 1887, a Chinese laborer by the name of Chae Chan Ping, who had immigrated to the United States in 1875, obtained such a certificate and left for China.⁶³ In 1888, while Chae Chan Ping made his return voyage to the United States, Congress voided the certificate program, leaving no exceptions for immigrants who had left already having received a certificate.⁶⁴ When he arrived one week later, he was excluded.⁶⁵ In the 1889 case of *Chae Chan Ping v. United States*, the Court unanimously declared Ping could be excluded from the United States because a Congressional decision to exclude aliens based solely upon race “[was] conclusive upon the judiciary.”⁶⁶ The Court held the federal power to regulate immigration was outside the scope of judicial review because it was a necessary and absolute incident of national sovereignty.⁶⁷

Four years later in *Fong Yue Ting v. United States*, the Court expanded upon its holding in *Chae Chan Ping*, broaden-

⁵⁹ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁶⁰ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁶¹ *See Chae Chan Ping*, 130 U.S. at 582 (quoting the Chinese Exclusion Act of 1882).

⁶² *See id.*

⁶³ *Id.* at 581.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 606.

⁶⁷ *Id.* at 581.

ing the scope of Congress's plenary power over immigration to deportation as well as exclusion.⁶⁸ At issue was a federal law which required all Chinese residents of the United States to either apply for a certificate of residence or produce before a judge "at least one white credible witness [that could vouch], that he was a resident of the United States at the time of the passage of this act" or be subject to deportation.⁶⁹ Three Chinese laborers, including Fong Yue Ting, failed to obtain the required certificates and were subsequently arrested.⁷⁰ In affirming the lower court's judgment ordering the immigrants deported, the Court reiterated its understanding of Congressional power over immigration as unfettered, stating that Congress's decision to deport a certain race of aliens lawfully within the country was a policy that "the judicial department cannot properly express an opinion upon."⁷¹

The Court's grant of plenary power over immigration to Congress has allowed the upholding of federal immigration laws that disadvantage certain groups in contravention of the equal protection principles of the Fifth Amendment. By immunizing immigration statutes from the burden of equal protection in *Chae Chan Ping* and *Fong Yue Ting*, the Court provided Congress with the ability to classify individuals on the basis of race. As Justice Frankfurter noted in his concurrence in *Harisiades v. Shaughnessy*, "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."⁷² While similar decisions given by the Fuller Court during the late nineteenth century have not only been overturned but disgraced, most notably *Plessy v. Ferguson*, the Supreme Court has repeatedly refused to abandon the plenary power doctrine. This refusal to review federal immigration laws has afforded courts the ability to uphold Congressional statutes which violate fundamental constitutional principles regarding

⁶⁸ *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893).

⁶⁹ *Id.* at 701.

⁷⁰ *Fong Yue Ting*, 149 U.S. at 712.

⁷¹ *Id.* at 731.

⁷² *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

individual rights. As Gabriel Chin has observed, “[i]n recent decades, [the federal circuit and district courts] have said not only that aliens may be excluded or deported on the basis of race without strict scrutiny, but also that such racial classifications are lawful per se.”⁷³ As a result of the sweeping language of *Chae Chan Ping* and *Fong Yue Ting*, Congress has passed blatantly racist federal immigration laws that have adversely affected the constitutional rights of immigrants as well as U.S. citizens.

During World War II, the perceived threat of the Japanese on American soil resulted in the imprisonment of thousands of Japanese immigrants and U.S. citizens in internment camps across California.⁷⁴ In part because of the internment of a significant portion of the work force, as well as the manpower shortage caused by the war, substantial opportunities arose for Latinos in America.⁷⁵ Yet, the peace caused by war for Mexican immigrants was short lived. In response to the economic competition caused by undocumented immigrant workers and the return of soldiers from abroad, Congress enacted “Operation Wetback.” As a result, an estimated one million Mexicans and U.S. citizens of Mexican origin were deported.⁷⁶ The impregnable fortress surrounding federal immigration law has thus been used to affect not only the individual rights of those outside of U.S. borders, but has also been used to justify the infringement of U.S. citizens’ rights based solely upon their race or national origin.

B. The Modern Interpretation of the Plenary Power Doctrine

While the Court has been virtually unyielding in its interpretation of the federal government’s power to exclude as absolute, time has nonetheless chewed some minor moth holes in the plenary power doctrine. The Court has held in certain cases it

⁷³ See Chin, *supra* note 15, at 3-4.

⁷⁴ See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); see also *Korematsu v. United States*, 323 U.S. 214 (1944) (sustaining the constitutionality of the evacuation order under public necessity, not immigration law).

⁷⁵ See BELL, *supra* note 50, at 729.

⁷⁶ See Eli J. Kay-Oliphant, Comment, *Considering Race in American Immigration Jurisprudence*, 54 EMORY L.J. 681, 700-02 (2005).

has the power to review the constitutionality of federal immigration laws. However, this judicial responsibility is extremely limited, giving great deference to the legislature and reviewing the statute only for rationality or some "facially legitimate and bona fide reason."⁷⁷

In *Kleindienst v. Mandel*, the Supreme Court reiterated that Congressional power to exclude continued to be absolute and immune from judicial intervention, despite its implication of some U.S. citizens' First Amendment rights.⁷⁸ At issue in *Mandel* was the Attorney General's discretionary denial of a temporary visa for Ernest Mandel, a Belgian journalist and Marxist, under an INA provision which barred entry of aliens who advocated the doctrines of world communism. Claiming that the denial of visas to people of certain beliefs infringed on their First Amendment right to associate with certain people, the plaintiffs, academics who planned to hear Mandel speak, challenged the constitutionality of the INA statute.⁷⁹ Although recognizing the plaintiffs' First Amendment rights, the Court nonetheless held that when the Attorney General's decision to exclude a certain alien is based on a "facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [constitutional interests of U.S. citizens]."⁸⁰ While *Mandel* reinforced the plenary power of Congress to prohibit entry of entire classes of people, it also indicated the Court's willingness to subject certain discretionary decisions to limited judicial review.

Five years later, the Court struck another blow to the plenary power doctrine in *Fiallo v. Bell*. In *Fiallo*, an unwed natural father and U.S. citizen challenged a provision of the INA on equal protection grounds, as it refused to grant special immigrant status to illegitimate children of U.S. citizen fathers while

⁷⁷ See *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (refusing to balance the rights of United States citizens against the interests of the government when the immigration statute was facially legitimate); *Reno v. Flores*, 507 U.S. 292 (1993) (holding immigrant classifications must only withstand a rational basis review).

⁷⁸ *Mandel*, 408 U.S. at 770.

⁷⁹ *Id.*

⁸⁰ *Id.*

permitting the status for alien children of unwed U.S. citizen mothers.⁸¹ Relying on the plenary power doctrine, the Court upheld the statute as it was “largely immune from judicial review.”⁸² The Court, however, did not concede that the plenary power doctrine barred substantive admission criteria from judicial review.⁸³ In explaining the scope, the Court indicated it has recognized the existence of “a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens.”⁸⁴ In doing so, the Court expanded upon the holding of *Mandel*, which allowed for limited judicial review of non-absolute classifications, by permitting substantive immigration classifications to be tested under the Fifth Amendment.⁸⁵

The standard of review set by *Fiallo*, however, is not entirely clear. Typically, when a statute or regulation differentiates between people on the basis of gender or legitimacy, the Court will require that the law serves some substantial government interest and that the classification is closely related to achieving that interest.⁸⁶ In *Fiallo*, the Court seems to contend that its “limited judicial responsibility” is restricted to a rational basis review and not to the same scrutiny as other domestic laws, even when the classification is based partly on an immutable characteristic of an American citizen. In 1993, the Court reaffirmed its stance declaring that immigration statutes “must . . . meet the (unexacting) standard of rationality advancing some legitimate governmental purpose.”⁸⁷ Several other lower courts have similarly interpreted the Court’s holding and have limited their reviews of federal immigration laws to ensuring rationality.⁸⁸ In the 2001 case of *Nguyen v. INS*, the Court applied in-

⁸¹ *Fiallo v. Bell*, 430 U.S. 787, 799-800 (1977).

⁸² *Id.* at 792 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

⁸³ *Id.* at 799-800.

⁸⁴ *Id.* at 793.

⁸⁵ *Id.* at 799-800; see Chin, *supra* note 15, at 64-65.

⁸⁶ *United States v. Virginia*, 518 U.S. 515 (1996) [hereinafter *The VMI Case*].

⁸⁷ *Reno v. Flores*, 507 U.S. 292, 306 (1993).

⁸⁸ See, e.g., *Miller v. Christopher*, 96 F.3d 1467, 1473 (D.C. Cir. 1996) (Wald, J., concurring), *aff’d*, *Miller v. Allbright*, 523 U.S. 420 (1998); *Hamama v. INS*, 78 F.3d 233, 236 (6th Cir. 1996); *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Newton v. INS*, 736 F.2d 336, 339 (6th Cir. 1984); see also Chin, *supra* note 15, at 65-66, n.320.

intermediate scrutiny to an immigration statute which differentiated between the illegitimate alien children of U.S. citizen fathers and mothers.⁸⁹ As the Court found no equal protection violation, it determined "we need not assess the implications of statements in our earlier cases regarding the wide deference accorded to Congress in the exercise of its immigration and naturalization power."⁹⁰ Justice O'Connor, dissenting, acknowledged that *Fiallo* requires courts to give great deference to federal laws that regulate the admission of aliens, but contended that the statute at issue regulated citizenship, rather than admission, therefore making *Fiallo* not applicable.⁹¹

C. Support for Affirmative Action in International Law

At no point within its text does the Constitution grant Congress the power to regulate immigration. Yet despite the language of the Tenth Amendment and the first section of Article I, the power to control immigration has been routinely acknowledged as federal and not as a power reserved to the states.⁹² The earliest immigration cases attempted to entrench this federal power in the Commerce Clause, contending that regulating immigration implicated the federal power to regulate commerce with foreign nations.⁹³ However, in the aftermath of the Civil War, the Court searched for another avenue in which it could find federal power over immigration that did not "lump the 'huddled masses yearning to breathe free' together with coal and hides."⁹⁴ As a result, the Supreme Court began suggesting that Congress's plenary power over immigration was based in the "powers inherent in sovereignty" under international law, rather than under any part of the Constitution.⁹⁵ Then, in the

⁸⁹ *Nguyen v. INS*, 533 U.S. 53 (2001).

⁹⁰ *Id.* at 72-73.

⁹¹ *Id.* at 96 (O'Connor, J., dissenting).

⁹² See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854-57 (1987).

⁹³ See *id.*; see also *Head Money Cases*, 112 U.S. 580 (1884).

⁹⁴ Henkin, *supra* note 92, at 856.

⁹⁵ See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 126-32 (2002).

1892 case of *Nishimura Ekiu v. United States*, the Court firmly cemented the plenary power doctrine in international law:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.⁹⁶

Not only has the Court's decision in *Ekiu* never been rejected, but it has been repeatedly upheld and expanded.⁹⁷

As such, many commentators have urged the Court to review and revise its immigration law decisions as they have often not reflected changes in international law.⁹⁸ As evidence, they provide two significant treaties: The International Convention on the Elimination of All Forms of Racial Discrimination (Race Discrimination Convention),⁹⁹ and the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁰ As Professor Chin explains, "[i]f international law ever permitted, or was neutral, on the issue of governmental racial discrimination, it is no longer; modern international law generally prohibits racial discrimination."¹⁰¹ However, while racial distinctions are clearly disfavored by these two treaties, they are not entirely prohibited in the context of affirmative action programs.¹⁰²

⁹⁶ 142 U.S. 651, 659 (1892).

⁹⁷ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (stating that the plenary power of a nation to expel undesirable aliens is found "not in the provisions of the Constitution, but in the law of nations").

⁹⁸ See Chin, *supra* note 15, at 60; See, e.g., Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995); Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. CAL. L. REV. 547 (1998); James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983).

⁹⁹ G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106 (Jan. 19, 1966) [hereinafter *Race Discrimination Convention*].

¹⁰⁰ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter *ICCPR*].

¹⁰¹ Chin, *supra* note 15, at 60.

¹⁰² See Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659 (1997).

The Race Discrimination Convention generally prohibits racial discrimination, demanding that the signatory nations "engage in no act or practice of racial discrimination."¹⁰³ Article 1 of the Race Discrimination Convention, however, expressly relieves certain race-conscious affirmative action programs from the stigma of "discrimination" under the treaty.¹⁰⁴ Furthermore, while the ICCPR generally provides that race-based discrimination is impermissible, the United States adopted the covenant with the "understanding" that certain forms of race-conscious affirmative action plans are permitted, but only when the racial distinctions are "at minimum, rationally related to a legitimate governmental objective."¹⁰⁵ Therefore, while international law may prohibit immigration statutes which clearly discriminate against individuals on the basis of race, it would seemingly uphold race-conscious laws that are targeted at correcting de facto discrimination, such as the achievement gap.

Furthermore, domestic courts could also uphold the statute absent the crutch of the plenary power doctrine as courts are, to the extent possible, to presume that Congressional statutes conform to international law, absent a clear Congressional statement to the contrary.¹⁰⁶ The "*Charming Betsy* rule," as it is often referred, has been frequently used by the Court to reconcile seemingly contradictory provisions of Congressional statutes and international treaties.¹⁰⁷ Therefore, despite the INA's general prohibition on discrimination on the basis of "race, sex, nationality, place of birth, or place of residence,"¹⁰⁸ the Court's explicit designation of the plenary power doctrine as a descendent of international law—and not the Constitution—may provide further justification for race-conscious affirmative action programs

¹⁰³ G.A. Res. 2106 (XX), *supra* note 103, at pt. I, art. 2. § (1)(a).

¹⁰⁴ *Id.* at art. 1, § 4 (excluding affirmative action programs from being defined as "discrimination"); see also Paust, *supra* note 102, at 665.

¹⁰⁵ S. Exec. Rep. No. 102-23, at 22 (1992), as reprinted in 31 I.L.M. 648, 659; see also Paust, *supra* note 106, at 661-62.

¹⁰⁶ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also Shayana Kadidal, "*Federalizing*" *Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration*, 77 FORDHAM L. REV. 501, 507 (2008).

¹⁰⁷ See Kadidal, *supra* note 106, at 507 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-41 (1987)).

¹⁰⁸ 8 U.S.C. § 1152(a)(1)(A).

that do not have to withstand strict scrutiny. As such, Congress could enact an immigration statute that regulates removal or entry of immigrants based upon race-conscious criteria, provided it also corrects some form of de facto discrimination.

III. AN END TO CATCH-AND-RELEASE IMMIGRATION: KEEPING FOREIGN STUDENTS IN THE UNITED STATES

A. Immigrant Desire to Come to America

People in the Ministry had told her rules were changing. So she had made Beatrice study night and day, day and night. All that money Tante had invested in her education, what was it worth? Sonny had won. So what now? What now? Reme, Tante, everybody had depended on her to get [a] big scholarship, to go away, to help Reme, to build [a] big house, to give them a chance to boast that she was in America. What they would do now? What she would do now? Become a seamstress?¹⁰⁹

In *You Alone Are Dancing*, Brenda Flanagan tells the story of Beatrice Salandy, a young woman living on the fictitious Caribbean island of Santabella, struggling to deal with the realization that despite years of hard work and unlimited potential, the possibility of higher education in America has been relegated to a dream lost behind the hum of a sewing machine.¹¹⁰ Throughout the world, many countries' brightest minds yearn for the chance to come to the United States to further their educations in hopes they may establish themselves and change the course of their fortunes. While many never get that opportunity, those that do generally take advantage of it.

The foreign-born student population in the United States represents some of the brightest minds in the world.¹¹¹ As U.S. colleges and universities are generally better funded, better endowed, and more independent than their international counter-

¹⁰⁹ BRENDA FLANAGAN, *YOU ALONE ARE DANCING* 36 (The University of Michigan Press 1996).

¹¹⁰ *Id.*

¹¹¹ Jagdish Bhagwati & Milind Rao, *The U.S. Brain Gain—At the Expense of Blacks?*, 39 CHALLENGE 50, 51 (1996).

parts, they typically attract many of the most talented students in the world.¹¹² For example, of all engineering Ph.D.'s awarded to Indian-born students in the United States, seventy-eight percent of the students had graduated from an Indian Institute of Technology (IIT), a network of schools that accepts only two thousand of the one hundred thousand applications the IITs receive each year.¹¹³ As Professor Bhagwati and Rao observe, "[o]ur investment in foreign graduate students . . . taps into the exceptionally talented—doubly screened by foreign institutions and our own."¹¹⁴ The consequences have been an enormous benefit for U.S. universities and the economy as a whole.¹¹⁵ While the allure of U.S. universities certainly contributes to the large number of foreign students who immigrate to the United States each year, the possibility of becoming a U.S. citizen after graduation is also an attraction.¹¹⁶

These students, however, come to the United States as non-immigrants, often being forcefully returned to their homelands, despite their desire to remain in the country.¹¹⁷ For example, of all 2003 foreign-born doctorate recipients in the United States, by 2004 only sixty-eight percent remained in the United States and by 2005 that number shrank to sixty-six percent.¹¹⁸ Even more telling is that the percentage of students who claimed an intention to stay in the United States after graduation significantly exceeded the number of students who actually re-

¹¹² Joseph Tiger, Note, *Re-Bending the Paperclip: An Examination of America's Policy Regarding Skilled Workers and Student Visas*, 22 GEO. IMMIGR. L.J. 507, 516-19 (2008).

¹¹³ See Bhagwati & Rao, *supra* note 113, at 51. Bhagwati and Rao also cite Korea, Taiwan, and the People's Republic of China as other examples. For instance:

Almost half (48 percent) of all Taiwanese students who receive Ph.D.'s in the United States attend either the National Taiwan University or Chen Kung University. Even more telling, 65 percent of the Korean students who receive science and engineering Ph.D.s in the United States were graduates of one university - Seoul National University.

Id.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*; STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 381-84 (4th ed. 2005).

¹¹⁷ 8 U.S.C. § 1101(a)(15)(F)(i) (2006).

¹¹⁸ Michael G. Finn, Stay Rates of Foreign Doctorate Recipients from U.S. Universities, 2005 2 (Oak Ridge Institute for Scientific Education 2007).

mained.¹¹⁹ Currently, more than 250,000 international students roam U.S. universities, and after a few years of decreased applications, the number is once again on the rise.¹²⁰ Upon graduation, however, many of these students have little choice but to return to their homelands.

The most common provision that nonimmigrant students use to remain in the U.S. after graduation is the H-1B “specialty worker” visa.¹²¹ The H-1B visa essentially provides an employer who wishes to hire a foreigner to fill a vacancy in a “specialty occupation,” the option of submitting a detailed form, which describes the nature of the position and the position’s prevailing wage according to industry standards.¹²² This option only affects a very minimal number of the 671,616¹²³ foreign students currently enrolled in U.S. colleges and universities. The Immigration and Nationality Act has issued an annual quota of effectively 85,000 specialty worker visas¹²⁴, thereby leaving many foreign students frustrated in their search for American employment. Furthermore, as one of the few visas that allow nonimmigrants to enter the United States with an intention to remain, the H-1B is in extremely high demand. For example, the U.S. Citizenship and Immigration Services (USCIS) announced on April 7, 2008—exactly one week after H-1B visa petitions could be submitted—that it had received enough petitions to satisfy the 85,000-visa quota for 2009.¹²⁵ The result has been a combi-

¹¹⁹ *Id.* at 11-12.

¹²⁰ See Wadhwa, *supra* note 19. After the terrorist attacks of September 11, 2001, many commentators concluded that the foreign student visa program was a threat to national security. As a result, much stricter foreign student laws were enacted, thus causing a decrease in the number of foreign students in the United States. *Id.*

¹²¹ 8 U.S.C. § 1101(a)(15)(H)(i)(6) (2006).

¹²² 8 U.S.C. § 1184(c) (2006); 20 C.F.R. § 655.731 (2007).

¹²³ See INSTITUTE OF INTERNATIONAL EDUCATION, OPEN DOORS 2009 REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE fig. 1A (Apr. 2010); *c.f.* OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT OF HOMELAND SECURITY, 2009 YEARBOOK OF IMMIGRATION STATISTICS tbl. 25 (Apr. 2010) (indicating that 951,964 nonimmigrant student visas were given out in 2009 alone).

¹²⁴ See 8 U.S.C. §§ 1184(g)(1)(A)(viii), 1184(g)(5)(C) (2009). The INA has placed a 65,000-visa limit on nonimmigrant specialty workers; however, it has also allocated an additional 20,000 H-1B visas for foreign students who have degrees at the master’s level or above. *Id.*

¹²⁵ U.S. Citizenship and Immigration Services, *USCIS Reaches FY 2009 H-1B Cap* (April 8, 2008), http://www.uscis.gov/files/article/H-1B_8Apr08.pdf; see also Wadhwa, *supra* note 19.

nation of highly educated foreign students returning to their homelands and an increase in illegal immigrants in the United States denying American citizens jobs.¹²⁶ The "golden doors" and the chance for permanent resident status or even citizenship, therefore, can work as a lure to entice highly educated immigrant students to remain in the U.S. and work in areas where there is a critical need: low-income, high-minority public schools.

B. The Proposed Statute

The first portion of the proposed statute would operate much like INA § 214(g)(5)(C), which authorizes an additional 20,000 H-1B visas to nonimmigrants who have earned "a master's or higher degree from a United States institution of higher education."¹²⁷ It would offer an additional 40,000 H-1B visas to nonimmigrant foreign students currently within the United States on F-1 visas who have (1) either (a) earned a bachelor's or higher degree from a U.S. institution of higher education, or (b) are scheduled to earn a bachelor's or higher degree from a U.S. institution of higher education within two months after the first day of April; (2) have received an offer of full-time employment to teach in a public school that (a) has a predominantly minority student body,¹²⁸ (b) is within the United States, (c) has consistently failed to meet the standards set by its state's assessment tests and the No Child Left Behind Act, and (d) has demonstrated a sufficient need for teachers in this position; and, (3) have agreed to remain employed by this school in this position for six continuous years.

The second portion of the statute would address the timing concerns for F-1 students who are applying for H-1B visas. Because H-1B applications are not accepted until April 1 and most college and university graduations are well after this date, the

¹²⁶ Being unable to secure another visa, many of these students are forced to choose whether to return to their homelands after graduation or remain in the United States illegally and risk deportation. See *Who's Keeping Track? Foreign Students Often Remain After Their Visas Expire*, ABC NEWS 20/20 (Nov. 14, 2001).

¹²⁷ 8 U.S.C. § 1184(g)(5)(C) (2006).

¹²⁸ "Predominately minority school" will be defined as any pre-university public school which has a seventy percent or higher minority student population.

majority of F-1 students have to wait an entire calendar year for any potential employer to file an H-1B petition on their behalf. Although Congress has recently amended the amount of time an F-1 student may stay in the United States after graduation for Optional Professional Training (OPT), the OPT program severely curtails the employment opportunities for these students. Furthermore, even if a student's H-1B visa is granted, he must wait until the beginning of the fiscal year in October to begin employment, a date which is generally weeks after the start of the school year.¹²⁹ For this reason, the proposed statute would move back the application date to the first day of March and delay issuance of these 40,000 H-1B visas until the first day of August, but have them count against the current fiscal year.

The third portion of the statute would address adjustment of status. The proposal would provide that upon maintaining employment in the same under-performing, predominately minority public school for six continuous years, the nonimmigrant's specialty worker status will automatically be adjusted to that of legal permanent resident. Finally, the statute would provide that upon voluntary loss of employment, the H-1B visa would expire and the nonimmigrant would be ineligible for another employment-based visa for four years. This provision would hopefully discourage aliens from using this teaching visa as a temporary holdover until a better opportunity presented itself.

C. How Would This Statute Benefit U.S. Public Schools?

A variety of different schools and school districts have gone to great lengths to fill their ever increasing teacher vacancies. As reported in the *New York Times*, Guilford County, North Carolina, has resorted to nationwide advertising campaigns and hiring incentives of \$10,000 for instructors who sign up to teach Algebra I.¹³⁰ In New York, prospective educators in math, science and special education are lured by a \$5,000 real estate incentive, and in Los Angeles, officials are offering a \$5,000 bo-

¹²⁹ 8 U.S.C. § 1184(g)(1)(A)(vii) (2006).

¹³⁰ Sam Dillon, *With Turnover High, Schools Fight for Teachers*, N.Y. TIMES, Aug. 27, 2007, at 1, http://www.nytimes.com/2007/08/27/education/27teacher.html?_r=3.

nus to educators who agree to teach in underperforming schools.¹³¹ In 2007, U.S. school districts spent nearly seven billion dollars recruiting, hiring and training their teachers with the majority being spent by the schools that could least afford it.¹³² As a result of increased expenditures on hiring and training replacement teachers, schools have been forced to both cut what may be viewed as non-essentials, such as sports programs, summer school, music and art programs, and driver's education, while also terminating many employees, such as custodians and food service personnel.¹³³ By implementing the proposed statute, school districts can significantly reduce their annual overhead by eliminating the majority of the money spent on teacher recruitment every year. Furthermore, because the statute requires six years of continuous teaching, schools may also reduce the amount of money spent on retraining new teachers every year.

Other school districts have attempted to use the H-1B visa program and the J-1 "cultural exchange" visa to procure non-immigrant teachers to fill their empty classrooms.¹³⁴ Although these programs have been relatively successful, they have resulted in harsh criticism for a variety of reasons, including, (a) the inability of the immigrant teachers to assimilate to American culture, (b) the added expense of finding and procuring visas for nonimmigrant teachers, and (c) the validity of professional certification from other countries.¹³⁵ Using foreign students helps eliminate these three concerns. First, students who have obtained bachelor degrees from U.S. universities and colleges have typically experienced four years of American culture

¹³¹ *Id.*

¹³² *Id.*

¹³³ Andrea Billups, *School Budget Cuts Threaten Gains*, WASH. TIMES, Mar. 11, 2009, at A1, <http://www.washingtontimes.com/news/2009/mar/11/schools-cut-budgets-where-it-hurts.children-most/>.

¹³⁴ See David Dishneau, *N.C. Firm Sending Foreign Teachers into Maryland Schools*, NEWSOBSERVER.COM, July 24, 2005, at 1, <http://www.nctq.org/research/1125326186163.pdf>; see also Antonio Planas, *Clark School District Recruits Teachers in Philippines*, LAS VEGAS REVIEW-JOURNAL, Mar. 28, 2005, http://www.reviewjournal.com/lvrj_home/2005/Mar-28-Mon-2005/news/26153393.html.

¹³⁵ Dishneau, *supra* note 134, at 1-2.

and have become assimilated to it. After four or more years, many foreign students begin to consider America as their home.

The second significant complaint that has arisen from school districts hiring of nonimmigrant teachers has been the extra cost associated with it. In 2005, facing a substantial teacher shortage, Washington County, Maryland, hired the Visiting International Faculty Program (VIF), a for-profit company that secures cultural exchange visas for foreign teachers, to fill ten hard-to-fill positions in their public schools.¹³⁶ Although the consensus from school districts that have used VIF is that the teachers have been a success, each VIF teacher costs the district about \$1,300 a year more than a “nonimmigrant” teacher.¹³⁷ A federal program which allows states to petition for these teachers frees up some of the funds spent by school districts in trying to secure enough teachers for their schools to function properly.

Finally, the validity of the students’ teacher certification should not be an issue as they (1) would have received it from an accredited U.S. university, and (2) the substantial competition for these visas should allow schools to secure only the best prospective teachers available. Aside from the specific complaints that have followed the use of nonimmigrants to fill teacher vacancies, a more general concern surrounding immigration exists in the native-born minority communities of the United States.

D. Immigrants and the Native-Born Minority Community

Certainly, the intersection of race and immigration has been a contentious issue as the United States stands as a beacon of hope and opportunity for many immigrants, yet for many African-Americans it represents a land of oppression and limited mobility.¹³⁸ In this “nation of immigrants,” African-Americans are quick to point out that they are not descendants

¹³⁶ *Id.* at 1.

¹³⁷ *Id.* at 2. (I believe his use of the term Anonimmigrant@ refers to non-foreign, not an H-1B visa.).

¹³⁸ See THE IMPACT OF IMMIGRATION ON AFRICAN AMERICANS 12 (Steven Shulman ed., Transaction Publishers 2004).

of immigrants, but of slaves.¹³⁹ As the economic prospects for U.S. workers lacking a college education continues to diminish and the achievement gap continues to exist, immigrant workers and students have generally been a cause of alarm in the African-American community. And for good reason.¹⁴⁰ Studies have been performed which indicate that immigration has resulted in lower levels of native born minority students graduating high school¹⁴¹ and obtaining higher education.¹⁴² Furthermore, many commentators contend the increase of foreign born students in American universities has resulted in the reduction of the number of black Ph.Ds,¹⁴³ and that positive impact received by the United States from immigration has resulted in adverse economic effects for blacks.¹⁴⁴

The results of these studies have fueled an anti-immigrant sentiment in the African-American community, premised on the notion that they have waited for these limited opportunities, and recent immigrants have cut in line and stolen them away.¹⁴⁵ However, as Professor Ikemoto observes, this understanding of African-American entitlement "assumes that the competition must occur among those forced to stand in line, not between those making the handouts and those subject to those hand-

¹³⁹ *Id.* at 13.

¹⁴⁰ See Daniel S. Hamermesh & Frank D. Bean, *Introduction to HELP OR HINDRANCE? THE ECONOMIC IMPLICATIONS OF IMMIGRATION FOR AFRICAN AMERICANS 1* (Daniel S. Hamermesh & Frank D. Bean, eds., Russell Sage Foundation 1998).

¹⁴¹ See Julian R. Betts, *Educational Crowding Out: Do Immigrants Affect the Educational Attainment of American Minorities?* in *HELP OR HINDRANCE?*, *supra* note 147, at 253, 253-78.

¹⁴² See Caroline M. Hoxby, *Do Immigrants Crowd Disadvantaged American Natives Out of Higher Education?* in *HELP OR HINDRANCE?*, *supra* note 147, at 282, 282-319.

¹⁴³ See Anthony DePalma, *Drop in Black Ph.D.'s Brings Debate on Aid for Foreigners*, N.Y. TIMES, Apr. 21, 1992, at 1.

¹⁴⁴ See *IMMIGRATION AND OPPORTUNITY: RACE, ETHNICITY, AND EMPLOYMENT IN THE UNITED STATES 3* (Frank D. Bean & Stephanie Bell-Rose, eds., Russell Sage Foundation 1999).

¹⁴⁵ See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581 (1993). One African-American source that Ikemoto spoke to had this to say about the immigration laws of the United States: "People here are out of jobs and yet they allow foreign people to come over and take work away from people born here in America . . . [T]hey can come over and get loans and open up businesses, but no one will lend any money to us." *Id.* at 1285 (quoting Phil Reeves, *Riots in America: Divided Community Settles Old Scores*, THE INDEPENDENT, May 2, 1992, at 2 (quoting Rodney Walker)).

outs.”¹⁴⁶ As a result, the conflict between African-Americans and immigrants serves only to reinforce white supremacy. By encouraging immigrants to teach in minority communities, rather than compete for jobs, better race relations between immigrants and native-born minorities may occur.

For example, the inclusion of Asian teachers into a predominantly African American school may help resolve racial tensions between minorities and immigrants by increasing each group’s understanding of the culture and experiences of the other. By keeping immigrant groups and native-born minorities separated, identification between the parties can only be based on differences, rather than similarities. As a result, each group perceives the other as a threat toward its own achievement. By putting immigrants into minority-rich classrooms, the two cultures are forced to interact in an academic setting, which hopefully will result in the identification of both commonalities and differences, and the development of solidarity between opposing communities.

CONCLUSION

While the enactment of the NCLB caused test scores across America to improve, the racial achievement gap continues to persist. With the Supreme Court’s current standard of review for race-conscious measures in secondary education as announced in *Parents Involved*, only seemingly inadequate policies could ever be upheld. This problem is reinforced by the mass exodus of quality teachers from low-income, high-minority schools to wealthier white schools. As a result, progress toward rectifying the achievement gap has become stagnant. Immigration law, however, may offer a solution. By offering nonimmigrant students who have obtained bachelor or higher degrees at U.S. universities, the ability to procure a temporary work visa and later adjust status to that of legal permanent resident, conditioned upon teaching in a minority-rich school for six years, the critical teacher shortage in many high-minority schools may

¹⁴⁶ *Id.* at 1286.

be rectified, thus resulting in a lessening of the achievement gap.

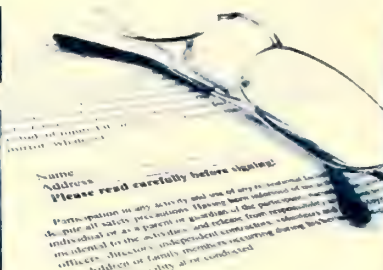
While many of our pre-university schools continue to fail to educate their students, our post-secondary schools are attracting much of the world's best intellectual talent, providing them with training, and then forcing them to return to their native lands, despite a desire to remain in the United States. By tapping into one of its best resources, the foreign-student population, the United States can not only remedy the critical teacher shortage in many schools, but also significantly reduce the seven billion dollars that U.S. schools districts spend annually on recruiting and training new teachers. Furthermore, by placing immigrant teachers into minority classrooms, the United States can hopefully resolve many of the internal conflicts between the nation's native-born minority communities and recent immigrants.

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